Supreme Court, U.S.
FILED

No. _____

05 131 JUL 22 2005

In The

Supreme Court of the United States

THE STEARNS COMPANY, LTD.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

BRUCE F. CLARK
Counsel of Record
JUDITH A. VILLINES
MICHELE M. WHITTINGTON
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
(502) 223-3477

CHARLES J. COOPER
DAVID H. THOMPSON
DAVID M. LEHN
COOPER & KIRK, PLLC
Suite 200
1500 K Street, N.W.
Washington, D.C. 20005
(202) 220-9600

Counsel for Petitioner

July 22, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In 1937, petitioner sold to the United States the surface rights in some 35,000 acres of land, but retained the rights to the minerals below the surface and the right to enter and use the surface estate to extract the minerals. Over forty years later, the United States ousted petitioner from the surface, extinguished the easement, and appropriated for itself the right to exclude petitioner. The question presented by this case is:

Whether the federal government's appropriation for itself of an easement constitutes a per se taking giving rise to a ripe cause of action for just compensation under the Fifth Amendment.

PARTIES AND CORPORATE DISCLOSURE

There are no named parties other than those stated in the caption. The Stearns Company, Ltd., has no parent company and no subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES AND CORPORATE DISCLOSURE	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. Statement Of Essential Facts	5
C. Judicial And Administrative Proceedings	7
REASONS FOR GRANTING THE WRIT	10
I. The Federal Circuit's Decision Below Conflicts With This Court's Precedent	10
II. The Federal Circuit's Decision That There Was No Per Se Physical Taking Conflicts With The Decisions Of Other Courts	18
III. The Federal Circuit's Ripeness Analysis Is Flawed Because It Is Entirely Dependent Upon Its Failure To Recognize The Government's Actions As A Physical Taking	22
IV. The Federal Circuit's Ruling Is Contrary To The Standards Recently Enunciated In *Lingle v. Chevron U.S.A. Inc.*	26
V. This Case Has Profound National Implications	28
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Arnett v. Myers, 281 F.3d 552 (6th Cir. 2002) 23

Augusta Power Co. v. United States, 278 F.2d 1 (5th Cir. 1960) 20

Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998) 21

Curtin v. Benson, 222 U.S. 78 (1911) 10, 11, 14

D'Addario v. Commissioner of Transp., 429 A.2d 890 (Conn. 1980) 21

Daniel v. County of Santa Barbara, 288 F.3d 375 (9th Cir. 2002) 23

Deepwells Estates v. Incorporated Village, 973 F. Supp. 338 (E.D.N.Y. 1997) 23

Department of Transp. v. Harkey, 301 S.E.2d 64 (N.C. 1983) 19

Dolan v. City of Tigard, 512 U.S. 374 (1994) 12

Duke Power Co. v. Toms, 118 F.2d 443 (4th Cir. 1941) 19

Forest Props., Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999) 22

Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000) 23

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 16, 18

Kelo v. City of New London, 843 A.2d 500 (Conn. 2004) 21

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074 (2005) ..... *passim*

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 3, 12, 13, 15

McKenzie v. City of White Hall, 112 F.3d 313 (8th Cir. 1997) 23

Milliken v. Town of Addison, No. 02-1164, 2002 U.S. Dist. LEXIS 17237 (N.D. Tex. Sept. 13, 2002) 24

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 12, 14, 17

Panhandle E. Pipeline Co. v. State Highway Comm'n, 294 U.S. 613 (1935) 11, 12, 14

Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87 (1st Cir. 2003) 23

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) 25, 28

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 11

Perry v. United States, 294 U.S. 330 (1935) 16

Phillips v. Postal Tel. Cable Co., 41 S.E. 1022 (N.C. 1902) 19

Ramex Mining Corp. v. Watt, 753 F.2d 521 (6th Cir. 1985) 7, 26

Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984) 29

Slavitt v. Ives, 303 A.2d 13 (Conn. 1972) 25

Stearns Co. v. United States, 396 F.3d 1354 (Fed. Cir. 2005) ..... *passim*

Stearns Co. v. United States, 53 Fed. Cl. 446 (2002) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Stringer v. United States, 471 F.2d 381 (5th Cir. 1973) 20

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 14

Theodorou v. Measel, 53 F. App'x. 640 (3d Cir. 2002) 23

United States v. 45.50 Acres of Land, 634 F.2d 405 (8th Cir. 1980) 21

United States v. Grizzard, 219 U.S. 180 (1911) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 16, 17

United States v. Smith, 307 F.2d 49 (5th Cir. 1962) 20

United States v. Twin City Power Co., 248 F.2d 108 (4th Cir. 1957) 19

United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961) 12

United States v. Welch, 217 U.S. 333 (1910) ..... *passim*

United States v. Winstar Corp., 518 U.S. 839 (1996) 29

Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155 (1980) 17

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 22

Yee v. City of Escondido, 503 U.S. 519 (1992) 22

CONSTITUTIONS

CONN. CONST. art. I, § 11 21

U.S. CONST. amend. V 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES

30 U.S.C. § 1201 *et seq.* (2005) 5

30 U.S.C. § 1272(e) (2005) 2, 6, 7, 23

OTHER

Lee Mueller, *Ruling on Unmined Coal Reversed*, LEXINGTON HERALD LEADER, Feb. 2, 2005 ..... 4, 28

2 JULIUS L. SACKMAN & RUSSELL D. VAN BRUNT, NICHOLS ON EMINENT DOMAIN (3d ed. 2005) 24

PETITION FOR A WRIT OF CERTIORARI

The Stearns Company, Ltd., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in this case.

OPINIONS BELOW

The Opinion of the Federal Circuit, decided January 28, 2005, is reported at 396 F.3d 1354 and reproduced in the appendix hereto ("App.") at 1a. The Order denying Stearns' Petition for Panel Rehearing or Rehearing En Banc, entered April 25, 2005, is unreported and reproduced at App. 93a.

The Opinion of the United States Court of Federal Claims ("CFC"), dated August 5, 2002, is reported at 53 Fed. Cl. 446 and reproduced at App. 9a. The Opinion of the CFC granting Stearns' Motion for Reconsideration, entered August 26, 2003, is reported at 58 Fed. Cl. 229 and reproduced at App. 80a.

JURISDICTION

This claim arises under the Tucker Act, 28 U.S.C. § 1491 (2005). The jurisdiction of the Federal Circuit was invoked pursuant to 28 U.S.C. § 1291 (2005). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2005).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

Section 522(e) of the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1272(e) (2005), reproduced at App. 98a.

STATEMENT OF THE CASE

A. Introduction

In contravention of more than a century of this Court's precedents, the Federal Circuit's ruling below holds that a government confiscation of an easement for its own benefit is not a compensable taking under the Fifth Amendment. Petitioner is a family-owned business that sold the surface rights to some 35,000 acres to the federal government nearly 70 years ago. Petitioner retained, however, the mineral estate and the right to extract coal under the land using deep-mining methods. In order to exercise this valuable right, it is undisputed that petitioner also retained an essential access easement to enter and use the surface estate to conduct deep-mining operations (e.g., construct roads and buildings). For decades, this régime remained in place, recognized and respected by the federal government.

In 1980, the federal government ordered petitioner's lessee to get off the land and to cease exercising petitioner's long-standing, state-recognized mining rights. The government, specifically the Office of Surface Mining ("OSM"), informed petitioner that under its newly adopted regulations, petitioner no longer had the right to utilize the surface to access its mineral estate, but rather could gain access to the surface only by obtaining the government's discretionary permission to do so.

Thus the government appropriated petitioner's *right* of access, thereby unifying in the government the sole right of access to the land and, concomitantly, the entire right to exclude *all* others, including petitioner. Petitioner was reduced to a potential licensee – with no more right to access and use the surface than a stranger to the property – and the mineral estate's marketability, and hence its value, was destroyed. Moreover, the government confiscated a

property right that petitioner had specifically refused to sell to the government, namely, the right to exclude petitioner *from the surface*. By claiming for itself "one of the most treasured strands in an owner's bundle of property rights," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the government effected a "classic taking in which government directly appropriates private property." *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2082 (2005).

The CFC so held, finding that the government had effected "a physical taking by operation of law" when it "eliminated [petitioner's] traditional property rights" and "transferred" those rights to itself. App. at 11a, 17a. Judge Loren Smith based his ruling on this Court's decision in *United States v. Welch*, in which Justice Holmes explained that "[a] private right of way is an easement and *is land*." 217 U.S. 333, 339 (1910) (emphasis added). The rationale for this rule is well-illustrated by petitioner's case: the easement here plainly constituted a right to physically enter and occupy the surface. This Court in *Welch* and a long line of similar cases has treated the taking of an easement as a physical appropriation, and the lower courts have done likewise.

The Federal Circuit's decision did not address the government's eviction of petitioner's lessee from the surface or its extinguishment of petitioner's easement. Instead, the Federal Circuit ruled that petitioner's taking claim was merely regulatory in nature, and was not yet ripe for adjudication. Under the Federal Circuit's reasoning, no taking of the easement had occurred because the government might later grant permission to access the surface in the future for mining purposes (one mine at a time). But as the CFC succinctly put it, the possibility of "an act of governmental grace" does not somehow restore petitioner's property right. App. at 21a. The opportunity to seek permission to enter "is not the same as ownership" of the *right* to enter. App. at 10a, 20a.

Indeed, the irony in the decision below is palpable. The essence of an easement – its very purpose – is to secure the right of access to property without having to seek and obtain the landowner's permission. Yet, according to the Federal Circuit, petitioner cannot complain that its easement was taken until it does precisely what the easement entitled it not to do – seek the owner's permission to enter the land above its coal. The Federal Circuit's decision conflicts with the decisions of this Court and the other lower courts that have considered this issue. And in light of the Federal Circuit's special role as the arbiter of takings claims against the federal government, the Federal Circuit's dramatic departure from binding precedent is all the more significant.

The parties to this case agree that the decision below will have broad national ramifications. As a spokesman for OSM acknowledged, "[f]rom an agency perspective, this is probably the most significant 'taking' decision ever to come out of federal court." Lee Mueller, *Ruling on Unmined Coal Reversed*, LEXINGTON HERALD LEADER, Feb. 2, 2005, at D1 (quoting Jim Taitt). For example, for decades the federal government has been able to expand the national forest system (and other federal land holdings) by purchasing only the surface rights to millions of acres, leaving private citizens with ownership of the underlying coal and appurtenant access easements to exploit those mineral estates. In this way, the federal government has been able to purchase land at a fraction of the cost of buying the land in fee simple. If the government is allowed to extinguish and appropriate for itself such access easements without compensation by the simple expedient of holding out the possibility that it will later grant permission to enter and use the surface, then not only will the sales value of these privately retained mineral estates be lost, but property holders will be unwilling to part solely with the surface rights in the future. And, the decision below has similar implications for the myriad other contexts in which private easements are created by governmental (federal,

state, and local) real estate transactions with private entities.

B. Statement Of Essential Facts

In 1937, petitioner sold the surface estate to some 47,000 acres in Kentucky to the United States for $2.85/acre, and the surface became part of the Daniel Boone National Forest.[1] Under the deed negotiated with the government, petitioner reserved the mineral estate, which included the right to remove the coal by underground mining methods. Petitioner's mineral estate was "dominant" (under both the contract and Kentucky law), meaning that its appurtenant easement to use the surface for mining prevailed over any competing interest of the United States as surface owner. The nature and extent of this easement as a property right under Kentucky law is not disputed. Petitioner's ownership of this easement was critical, since without the right to access the surface to extract the coal (through deep-mining methods), the mineral estate would have been unmarketable.

Petitioner deep-mined the coal utilizing this surface access easement for over 40 years, without the United States raising any question about the nature or extent of petitioner's property rights. This changed in 1980, when petitioner leased a portion of the subject property to Ramex for purposes of deep mining. Ramex developed its mining plans in accordance with petitioner's rights retained under the deed, and obtained all necessary generally applicable mining permits from the appropriate regulatory agency, the Kentucky Department for Natural Resources & Environmental Protection, which issued the permits in accordance with regulatory standards established by SMCRA, 30 U.S.C. § 1201 *et seq.* (2005). Further, the federal government, acting through the United States

[1] Petitioner subsequently sold some of its coal land, leaving it with the 35,611 acres that are the subject of this action.

Forest Service, formally approved Ramex's proposed mining plans. Having obtained all necessary permits and approvals, Ramex began initial deep-mining operations, pursuant to petitioner's surface easement. Soon thereafter, this controversy began.

On December 3, 1980, acting pursuant to a section of SMCRA that applies only to mining on "federal lands," Section 522(e)(2), OSM ordered petitioner's lessee to halt development of its mining operations on 26 surface acres of petitioner's coal lands. Section 522(e)(2) provides:

> After the enactment of this Act . . . and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act . . . shall be permitted –
>
> . . .
>
> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations *may be permitted* on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and –
>
> (a) surface operations and impacts are incident to an underground coal mine. . . .

App. at 98a-99a (second emphasis added).

OSM interpreted Section 522 as prohibiting petitioner's lessee's deep-mining operations unless petitioner had "valid existing rights" ("VER") or its lessee had requested and obtained government permission to mine. At the time, OSM defined VER as requiring petitioner to have secured all of its mining permits prior to the enactment of SMCRA (August 3, 1977). By 1977, none of petitioner's property had such permits, and petitioner's lessee had not yet obtained its permits to mine some 26 surface acres. Accordingly, OSM determined that petitioner lacked VER in all of the surface, leaving petitioner only the possibility of obtaining the government's permission to use the land upon a favorable compatibility determination (issued on a

mine-specific basis). By so doing, the United States appropriated for itself petitioner's right of access to the surface.

The United States' appropriation of petitioner's easement eliminated the marketability, and therefore the sales value, of petitioner's total mineral estate. Coal serves only one purpose – to be mined for its energy. Unless a mineral owner has the right to access and use the surface to extract the coal, the coal rights cannot be bought and sold in the marketplace. Before the CFC, both a prospective purchaser and an expert witness testified that without the *right* to access the surface estate, no one would be willing to purchase the mineral estate. App. at 108a-109a (testimony of Charles Mills); App. at 103a-105a (testimony of James Boyd). Given that petitioner wants to sell its mineral estate but cannot find a willing buyer because of the taking of its easement, it is irrelevant whether petitioner, by "an act of governmental grace," App. at 21a, may be permitted to use the surface.

C. Judicial And Administrative Proceedings

Petitioner first sought a judicial determination that SMCRA Section 522(e)(2), prohibiting mining on "Federal lands," did not apply to privately held easements in and to the surface. The United States Court of Appeals for the Sixth Circuit disagreed. That court further declared that petitioner's taking claim "was not ripe for adjudication" until it had sought (and been denied) a determination from OSM that its deed rights constituted VER within the meaning of Section 522(e)(2). App. at 91a.

Petitioner then complied with the court's directive to seek a favorable VER ruling. However, at the time, OSM still adhered to a VER definition that required petitioner to have had all of its mining permits in place in 1977 – a concept unthinkable for a 35,611-acre tract of mineral land. On December 3, 1986, OSM formally confirmed the

denial of VER status to petitioner's easement. The Interior Board of Land Appeals affirmed this denial of VER in 1989. This ruling confirmed that petitioner's right to access the surface – a right it had held and exercised for over forty years – had been appropriated by the United States, which now had the concomitant right to exclude petitioner from that land – a right the United States did not purchase from petitioner.

Having exhausted its administrative remedy concerning the nature, extent, and ownership of what had formerly been its mining rights, petitioner then brought this "taking" action in the CFC. Petitioner's theory was straightforward: Because its most critical property right, the one that allowed access to its coal – the state-recognized easement – had been extinguished by OSM's actions and because the United States gained unfettered ownership and control of the entirety of that property right, just compensation by the United States is owed. Moreover, because just compensation for the governmental appropriation of an easement is determined by the effect of the loss of the easement on the fair market value of the affected property, *Welch*, 217 U.S. 333, petitioner sought damages based upon the loss of market value of all of its mining rights.

The government responded that petitioner's taking claim was not ripe. In complete disregard of the appropriation of petitioner's property right by the United States, without any reference to OSM's VER denial, and contrary to the Sixth Circuit's "ripeness" ruling, the government contended that petitioner must first ask the government for its discretionary permission, via the "compatibility" proviso, to use the surface each time it wants to access its coal.

As a threshold matter, the CFC confirmed that under Kentucky law, petitioner's "carefully retained mineral estate included the right to access those minerals, over and through the surface, a dominant appurtenant easement." App. at 22a (citing *Imperial Elkhorn Coal Co. v.*

Webb, 225 S.W. 1077, 1078 (Ky. 1920), KY. CONST. § 19 (mineral estate is dominant), and *McIntire v. Marion Coal Co.*, 227 S.W. 298 (Ky. 1921)). The CFC then concluded that the government's actions were "a physical taking by operation of law." App. at 11a. This was because the United States (acting as surface owner), had claimed petitioner's right to the surface for itself. After its denial of petitioner's valid existing rights, the United States (as surface owner) was left standing, alone, where petitioner (and its lessee, Ramex) had once stood. Petitioner suddenly had no right to enter the surface. As the CFC acknowledged, once the government denied petitioner VER status, petitioner could only have sought a compatibility determination and then hoped that the government "granted what can best be described as a license to mine." App. at 20a.

Petitioner has not sought a compatibility determination from the government. The reason is straightforward. As a small, family-owned business, petitioner had decided to exit this capital-intensive industry and sell all of its mineral estates, which it has done with the exception of the coal property that is the subject of this suit. A permissive, perhaps temporary, opportunity for access has no value to a purchaser in an industry that imposes substantial coal acquisition costs and requires significant capital expenditures. Thus, the possibility of a favorable compatibility ruling would not restore petitioner's easement, let alone the value of its mineral estate. Based on the testimony presented, *see supra* p. 7, the CFC found that the mineral estate was "worthless" without the right of access to the surface. App. at 22a.

In light of this economic and legal reality, the CFC rejected the principal defense of the United States, i.e., that petitioner's taking claim was not "ripe" because, under SMCRA Section 522(e)(2), petitioner could have sought permission from the government, as surface owner, to mine. The CFC reasoned that the taking of the easement had occurred "before the compatibility proviso

became relevant to the proposed mining operation." App. at 17a. Judge Smith held correctly: "Allowing someone permission to use the property you took from them does not undue [sic] the taking." App. at 16a.

In reversing the CFC, the Federal Circuit's opinion failed to address the CFC's analysis, the effect of OSM's adverse actions upon petitioner's property right (the easement), or the effect of the loss of that right on the value of petitioner's mineral estate. Rather, the opinion erroneously concluded that no physical taking had occurred and that any taking claim regarding petitioner's property right would be "regulatory" in nature, which would be ripe only upon a compatibility determination made by OSM. App. at 6a.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit's Decision Below Conflicts With This Court's Precedent.

A. Almost a century ago, Justice Holmes explained that "[a] private right of way is an easement and *is land*." *Welch*, 217 U.S. at 339 (emphasis added). In the following Term, this Court made clear that the elimination of an easement is a "physical taking." *United States v. Grizzard*, 219 U.S. 180, 182-183 (1911). In both *Welch* and *Grizzard*, the taking was effected by the government's flooding of land resulting in a physical occupation of the easement. The bottom line is that whenever the government, because of its ownership of the surface, extinguishes a private citizen's easement, thereby claiming for itself the right to exclude the holder of an easement from that surface, a physical taking of the easement has occurred. In subsequent cases, this Court made clear that this is so irrespective of the means of implementing this change in status.

In *Curtin v. Benson*, 222 U.S. 78 (1911), it was irrelevant that the government sought to deprive the property

holder of an easement to graze his cattle through a prohibitory order issued pursuant to a regulation rather than by erecting a fence to keep him out. In that case, this Court considered the validity of action by which the government arrogated to itself an easement and left the easement holder with only the opportunity to ask for permission to access the land. The plaintiff wished to drive his cattle through Yosemite National Park to land he owned within the Park. The government refused to allow him to enter the Park without first receiving its permission. Reversing the district court's dismissal, this Court explained, "The right of [the property owner] to pasture his cattle upon his land and *the right of access to it* are of the very essence of his proprietorship." *Id.* at 86 (emphasis added).

Since these early decisions, this Court has consistently held that an easement is land, pure and simple, and that the governmental taking of an easement must therefore be compensated. This Court has so held without making any inquiry into whether the regulatory action went "too far," as would be required under the regulatory takings analysis established by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Indeed, it was not until twelve years after *Welch* that this Court even acknowledged the possibility of regulatory takings.

For example, in *Panhandle Eastern Pipeline Co. v. State Highway Commission*, 294 U.S. 613 (1935), this Court considered a pipeline company's ownership rights in easements utilized for the transport of natural gas. The Kansas Supreme Court had held that the company could be required, without compensation, to move its pipeline to make way for a public highway cutting through its easement. The Kansas Supreme Court explained that "[r]easonable regulations [to further public safety] may be enforced without compensation . . . and the orders of the highway commission do not involve a taking of private property without due process of law." *Id.* at 617-18. This Court reversed, holding that "[a] private right of way is an

easement and is land." *Id.* at 618 (citing *Welch*, 217 U.S. at 339); *see also United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627 (1961) ("It is indisputable, as the Government acknowledges, that a flowage easement is 'property' within the meaning of the Fifth Amendment. Similarly, there can be no question that the Government's destruction of that easement would ordinarily constitute a taking of property within the meaning of the Fifth Amendment.") (collecting cases); *Loretto*, 458 U.S. at 430 (A "right-of-way 'cannot be appropriated in whole or in part except upon the payment of compensation.'") (quoting *Western Union Tel. Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540, 570 (1904)).

More recently, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court reaffirmed the vitality of the principles animating these earlier cases. In *Nollan*, this Court considered the validity of a condition on a construction permit requiring the property holder to grant the public an easement across their beachfront property. As a threshold matter, this Court explained:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, . . . we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. . . . We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous *right* to pass to and fro. . . .

483 U.S. at 831-32 (emphasis added) (internal citations omitted). Likewise, this Court in *Dolan* held that "[w]ithout question, had the city simply required petitioner to dedicate

a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." 512 U.S. at 384 (citing *Nollan*, 483 U.S. at 831). In short, as this Court explained just last Term in *Lingle*, "*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se physical takings*." 125 S. Ct. at 2087 (emphasis added).

Although *Welch* involved governmental interference with an easement and *Nollan* involved governmental acquisition of an easement, Justice Holmes's decision in *Welch* and the decision in *Nollan* are perfectly consistent. The right of access at stake in *Welch* and the right to exclude at stake in *Nollan* implicate the very same physical property interest. If the landowner has the right to exclude someone, then that person does not have the right to access the land; if someone has the right to access land, then the landowner does not have the right to exclude that person. These rights of access and exclusion are, therefore, two sides of the same coin. Where, as here, a seller of the surface estate of real property retains the right to enter and use the surface for specific purposes, the government, as purchaser of the surface estate, cannot later decide to exclude the holder of the easement from the surface without Fifth Amendment liability.

As the CFC found, petitioner retained the right to erect "camps, roads, bridges and other structures or improvements necessary in carrying on mining." App. at 26a. Indeed, the 1937 deed guaranteed to petitioner the unencumbered right to take physical occupation of the surface. Without this right, petitioner has no easement and therefore no land.

When OSM ousted petitioner's lessee from the surface, the government extinguished petitioner's easement and appropriated for itself the right to exclude petitioner ("one of the most treasured strands in an owner's bundle of property rights," *Loretto*, 458 U.S. at 435) from the surface. The government thereby deprived petitioner of its right of access. Indeed, petitioner would be in the same

position had the government formally condemned the easement – an act for which the government undoubtedly would owe just compensation. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325 (2002) ("Condemnation . . . gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose.").

For a century, this Court has made clear that the appropriation of an easement, such as was effected here, is a taking of property that must be accompanied by compensation. In finding that the government's actions effected a taking of petitioner's easement in this case, the CFC recognized the significance of *Welch* and its progeny. *See* App. at 22a. In reversing the CFC's decision, the Federal Circuit flatly and erroneously ignored them.

The government's actions in this case effected a *physical* taking of petitioner's easement. This Court has never held that a physical taking occurs only if the government literally moves onto someone's property. Rather, this Court has looked to the nature of the property right that the government has abridged or appropriated. In *Nollan*, for example, this Court recognized that the "permanent *physical* occupation" would occur when the public acquired the *"right"* to access the land, not when members of the public showed up with their beach chairs. 483 U.S. at 832 (emphasis added); *see also Curtin*, 222 U.S. at 86 (government order prohibiting entry); *Panhandle*, 294 U.S. at 618 (government order to convey public easement). In this case, the government, as owner of the surface estate, confiscated petitioner's right to access its minerals and appropriated for itself the right to exclude petitioner. That the government did this by a VER determination is of no moment. As the CFC declared correctly, this was "a physical taking by operation of law." App. at 11a.[2]

[2] The fact that the confiscation of petitioner's easement was performed by a government agency implementing a regulatory scheme

(Continued on following page)

As this discussion suggests, this case does not implicate the authority of government to regulate private property. Petitioner has no objection to the permitting requirements of SMCRA that applied to all coal mining operations. (Indeed, petitioner's lessee held all such regulatory permits at the time of the taking here.) Rather, petitioner's challenge is focused exclusively on the government's decision to enhance its own property rights at the expense of a private citizen. Here, the government did so by appropriating for itself the right to exclude petitioner from its mineral estate – a right that the government did not purchase in 1937. And the government exercised that right by ousting petitioner's lessee from the surface. The government cannot now take that right for itself without paying just compensation.

B. Because the government's actions clearly constitute a "classic taking" – both as a physical taking and as a direct appropriation – this Court's framework for analyzing regulatory takings has no application in this case. The Federal Circuit consequently erred in characterizing petitioner's claim as a regulatory taking.

But even under a regulatory takings analysis, the Federal Circuit still erred in reaching its decision. This Court has just reaffirmed in *Lingle* that "the complete elimination of a property's value" results in a per se taking. 125 S. Ct. at 2082. Here, the trial court found that petitioner had suffered just such a deprivation of value. The Federal Circuit did not disagree with this factual finding. Rather, the Federal Circuit simply ignored it.

As explained above, the government completely eliminated petitioner's easement, and thus the easement

---

does not mean that petitioner's taking claim should be analyzed as a regulatory rather than a physical taking. *See, e.g.*, *Lingle*, 125 S. Ct. at 2081 (a permanent physical invasion is one of "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes"); *Loretto*, 458 U.S. 419 (1982) (per se physical taking even though invasion was made pursuant to a state regulation).

necessarily cannot be sold and has no value. After hearing evidence at trial relating to the value of the coal property, the trial court held that "[t]he right to seek permission does not have much value in the marketplace." App. at 22a. The court explained, "The 'right' to exploit the minerals would be worthless without the additional right to access them. If the lessee of the mineral estate has to ask the owner of the surface for a right-of-way to access the minerals, then the lessee has no easement at all." App. at 22a (internal quotation marks omitted). In the face of the trial court's finding that the coal became worthless without the easement, *Lingle* compels the conclusion that a taking has been effected.

C. In the court of appeals, the government sought to defeat its liability by invoking a trilogy of regulatory takings cases: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). All three are inapposite because none involves a governmental appropriation of property rights for the government's own benefit. Rather, in all three, the government's role as a regulator, not as a property holder, was challenged. It is well-established that whatever latitude the government may have to regulate the exercise of private property rights, it cannot claim or enhance property in its proprietary capacity without paying just compensation. *See Perry v. United States*, 294 U.S. 330, 350-51 (1935) ("There is a clear distinction between the power of the Congress to control," i.e., regulate, private property and transactions, and "the power of the Congress to alter or repudiate the substance of its own engagements . . . ."). Nevertheless, we briefly discuss each of the government's cases.

In *Riverside*, this Court addressed a regulation that authorized the Army Corps of Engineers to require landowners to obtain permits before discharging fill material into wetlands adjacent to navigable bodies of water. 474 U.S. at 123. Emphasizing that the question before it was

"primarily one of regulatory and statutory interpretation," *id.* at 126, this Court considered whether a "narrow reading of the Corps' regulatory jurisdiction over wetlands was 'necessary' to avoid 'a serious taking problem.'" *Id.* at 127. This Court held that the Corps' regulation should not be enjoined because the Tucker Act "presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute." *Id.* at 128 (citing 28 U.S.C. § 1491). This Court also observed that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *Id.* at 127. *Riverside* thus makes clear that regulatory permitting régimes are generally valid, a proposition that is not disputed by petitioner, whose lessee had applied for and received all necessary environmental and mining permits. *See supra* pp. 5-6. But nothing in *Riverside* suggests that the government may extinguish the property of another and appropriate that right for itself without paying compensation by simply labeling such an appropriation a "permitting" requirement.[3]

In *Keystone*, this Court considered a state regulation that affected "less than 2%" of plaintiffs' coal. 480 U.S. at 498.[4] This Court rejected plaintiffs' claim because they

---

[3] As this Court said in *Nollan*, "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." 483 U.S. at 831; *see also Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

[4] As this Court repeatedly emphasized, "the posture of the case [was] critical" because plaintiffs "face[d] an uphill battle in making a *facial attack* on the Act as a taking." *Keystone*, 480 U.S. at 494, 495 (emphasis added).

"retain[ed] the right to mine virtually all of the coal in their mineral estates." *Id.* at 501. Here, after OSM's "regulatory" VER action, petitioner had lost its right to mine, rendering its coal rights worthless. Moreover, in *Keystone*, as in *Riverside*, there was no suggestion that Pennsylvania had appropriated property for itself. *Id.* at 488 n.18. Here, there is no doubt that the extinguishment of petitioner's easement resulted in the appropriation of that right by the United States.

Finally, *Hodel* was a facial challenge to SMCRA in which both the lower court and the plaintiffs failed to "identif[y] any property in which [they] have an interest that has allegedly been taken by operation of the Act." 452 U.S. at 294. Specifically, this Court explained that plaintiffs "made no showing in the District Court that they own tracts of land that are affected by this provision." *Id.* at 297. This Court also noted that plaintiffs could apply for a determination that they retained "valid existing rights." *Id.* at 294. This Court elaborated, "[T]he court below ignored this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Id.* Thus, this Court rejected the facial challenge to Section 522(e) – the provision that is challenged here – because the challenge was "premature." *Id.* at 296 n.37. Here, of course, petitioner satisfies both conditions for an "as applied" challenge to Section 522(e) – it owns land affected by 522(e) and has unsuccessfully applied for VER status. Thus, the holding of *Hodel* is likewise inapposite to this case.

II. The Federal Circuit's Decision That There Was No Per Se Physical Taking Conflicts With The Decisions Of Other Courts.

In light of this Court's settled precedent, the CFC held that the government's actions effected a "physical taking by operation of law." App. at 11a. In reversing, the Federal Circuit held that OSM's denial of petitioner's right to

access the surface land should be analyzed under the rubric of regulatory takings rather than physical takings. In so ruling, the Federal Circuit not only deviated from binding precedent of this Court, but also ran contrary to the decisions of other federal appellate and state supreme courts that demonstrate the continuing vitality of those venerable precedents. The courts in those cases found compensable takings without inquiring whether the denial of access went "too far" and without engaging in any kind of balancing test; the denial of access alone was sufficient to constitute a taking, entitling the easement holder to just compensation. This Court should grant this petition to resolve the conflict created by the Federal Circuit's inconsistent ruling.

The Fourth Circuit has analyzed the governmental denial of the right of access as a physical taking of an interest in land. In *Duke Power Co. v. Toms*, 118 F.2d 443 (4th Cir. 1941), Toms owned the mineral estate of a 100-acre tract. Duke Power, a public utility, constructed a dam, which caused flooding on the tract, thereby cutting off all of Toms' access to his mineral estate. The Fourth Circuit found that as the owner of a mineral estate, Toms had an easement in the surface to access the minerals, and that "[t]his easement of the owners of the mineral rights may no more be taken . . . without just compensation than the rights of the owner of the surface may be taken from him." *Id.* at 447. The Fourth Circuit concluded that Duke Power's interference with Toms' right of access amounted to a taking entitling Toms to just compensation. *Id.* at 448-49;[5] *see also United States v. Twin City Power Co.*, 248 F.2d 108, 113 (4th Cir. 1957) (looking to *Welch*, finding that plaintiff's flowage easement is an "'*interest in the land* that is being taken by the government here in the condemnation proceeding and

[5] It is well-established that North Carolina takings law is federal takings law. *See, e.g., Phillips v. Postal Tel. Cable Co.*, 41 S.E. 1022, 1024-25 (N.C. 1902); *Department of Transp. v. Harkey*, 301 S.E.2d 64, 67 n.* (N.C. 1983).

entitles it to compensation . . . .'") (quoting *United States v. 2979.72 Acres of Land*, 235 F.2d 327, 329 (4th Cir. 1956)).

The Fifth Circuit has adhered to the same approach as the Fourth Circuit. In *Augusta Power Co. v. United States*, 278 F.2d 1 (5th Cir. 1960), the Fifth Circuit confronted the same issue that the Fourth Circuit had confronted in the related case of *Twin City Power*, cited above. Here, the flowage easements were held by Augusta Power. The Fifth Circuit expressly agreed with the Fourth Circuit's decision, holding that Augusta Power was entitled to just compensation for the loss of its flowage easements. *Id.* at 3.

Also, in *United States v. Smith*, 307 F.2d 49 (5th Cir. 1962), Smith had owned a 100-acre tract of land, subject to an easement held by Hall County for use as a public road. The United States had brought a condemnation action against Smith to take 60 acres of his tract, "subject to existing easements for public roads." *Id.* at 50. Six months later, the United States brought a separate condemnation action against Hall County to condemn "all outstanding right, title and interest" in the original Smith tract. *Id.* at 56. Through these proceedings, Smith and Hall County were awarded compensation for their respective condemned property. *Id.* at 55-57. The United States then flooded the road, which left the developed part of Smith's remaining 40 acres "without access to the road which had provided his communication with the outside world." *Id.* at 50-51. Smith consequently brought a takings action. After noting that "Smith had an absolute right of access to [the road] as the owner of the fee and an abutting property owner," *id.* at 55, the Fifth Circuit, guided by *Welch*, held that the right of access "constitutes land and is [a] compensable right." *Id.* at 57. The United States' denial of that right entitled Smith to compensation, neither of the prior condemnation awards having included compensation for Smith's lost access right. *Id.* at 56-57; *see also Stringer v. United States*, 471 F.2d 381, 383 (5th Cir. 1973) (United States conceded on appeal that blocking plaintiff's access

to house effected "*complete 'taking'*" of plaintiff's easement) (emphasis added).

Likewise, the Eighth Circuit has followed *Welch*. In *United States v. 45.50 Acres of Land*, 634 F.2d 405 (8th Cir. 1980), the United States condemned about 45 acres of farmland to acquire a flowage easement in connection with a dam and reservoir project. It was determined that the water would periodically reach such a level as to cut off both access routes to the farm. *Id.* at 406. Relying on *Welch*, the Eighth Circuit found that "the potential taking of the right of access to the . . . farm, if flooding were to occur, is a separate and *distinct invasion of a property interest*, namely the 'right-of-way,' from that of the land 'served by the right-of-way.'" *Id.* at 407 (emphasis added).[6]

State courts, too, have treated the elimination of the right of access as a per se physical taking. *See, e.g.*, *D'Addario v. Commissioner of Transp.*, 429 A.2d 890, 894 (Conn. 1980) ("having been deprived of his rights to unrestricted access, [property owner] was entitled to be compensated for this loss");[7] *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 317-21 (Iowa 1998) (citing *Welch* as involving example of physical yet non-trespassory per se taking).

In this case, however, the Federal Circuit completely ignored *Welch* and its progeny. Quoting its decision in

---

[6] The Eighth Circuit did not reach the question whether there had been an actual taking only because it held that, under the Tucker Act, the district court hearing the condemnation action lacked jurisdiction to hear the taking claim. *45.50 Acres of Land*, 634 F.2d at 406.

[7] Because the Fifth Amendment and the Connecticut Constitution are "virtually identical" with respect to their takings clauses, the Connecticut Supreme Court interprets the state constitutional provision in accordance with and by reference to the federal standard. *Kelo v. City of New London*, 843 A.2d 500, 521-22 (Conn. 2004) (internal quotation marks omitted); CONN. CONST. art. I, § 11.

Forest Properties, Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999), which in turn quoted this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992), the Federal Circuit stated that "[a] physical taking occurs 'when the government itself occupies the property or "requires the landowner to submit to physical occupation of its"' land." App. at 5a. This statement of the law is correct as far as it goes. The Federal Circuit, however, made two errors. First, the Federal Circuit treated *Forest Properties* and *Yee* as establishing the *only* circumstances under which a per se physical taking can occur. As *Welch* and its progeny make clear, however, the appropriation of the right of access is another, long-standing circumstance in which a per se physical taking occurs. Second, the Federal Circuit incorrectly concluded that the government has not actually occupied petitioner's easement or required petitioner to submit to a third party's presence on the easement. These conclusions cannot be reconciled with the facts of this case or established precedent.

The Federal Circuit, therefore, should have analyzed the government's denial of petitioner's right to access the surface land as a physical taking, consistent with *Welch* and its progeny. Had it done so, there would have been "no doubt" that the confiscation of petitioner's easement constitutes a per se physical taking.

III. The Federal Circuit's Ripeness Analysis Is Flawed Because It Is Entirely Dependent Upon Its Failure To Recognize The Government's Actions As A Physical Taking.

Even though the government had already ruled that petitioner's easement did not qualify for VER status, the Federal Circuit held that petitioner's taking claim was not ripe under the test articulated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). Under *Williamson County*, a taking claim is not ripe until the government has made a "final decision" regarding the property and the property

holder has exhausted other available procedures for obtaining just compensation. *Id.* at 186, 195. The Federal Circuit found that OSM's action was not "final" because petitioner "may still obtain permission to use its easement and access the mineral estate by seeking a compatibility determination," as provided for in Section 522(e)(2). App. at 7a. The Federal Circuit's abrupt rejection of petitioner's claim as unripe is fatally flawed in several ways.

First, the court's ripeness analysis is entirely dependent upon its conclusion that petitioner's taking claim is regulatory in nature. Indeed, courts agree that a physical taking satisfies the finality requirement of *Williamson County*. As the Ninth Circuit has explained,

> [t]he ripeness analysis of *Williamson County* applies to physical takings, but in a modified form. The [finality] requirement is automatically satisfied at the time of the physical taking. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1986) ("Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact."), *overruled on other grounds by Yee v. City of Escondido*, 503 U.S. 519 (1992).

Daniel v. County of Santa Barbara, 288 F.3d 375, 382 (9th Cir. 2002).[8] Presumably, the Federal Circuit, too, would

---

[8] *See also Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003) (following *Daniel*); *Theodorou v. Measel*, 53 F. App'x 640, 643 (3d Cir. 2002) ("A physical taking is by definition a final decision for the purpose of satisfying *Williamson*'s first requirement."); *Arnett v. Myers*, 281 F.3d 552, 563 (6th Cir. 2002) (government action was final at moment it removed and destroyed plaintiff's property); *Forseth v. Village of Sussex*, 199 F.3d 363, 372 n.12 (7th Cir. 2000) ("a physical invasion is a 'final decision'"); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) ("A physical taking is by definition a final decision for the purpose of satisfying *Williamson*'s first requirement."); *Deepwells Estates v. Incorporated Village*, 973 F. Supp. 338, 347-48 (E.D.N.Y. 1997) ("A physical taking claim 'is by definition a final decision, and thereby satisfies *Williamson County*'s first ... requirement.'") (quoting

(Continued on following page)

have recognized as much if it had properly analyzed petitioner's underlying claim as a physical taking. But because of its unduly narrow view of physical takings, the court below misconstrued *Williamson County*. Petitioner's taking claim became ripe when OSM denied petitioner VER status, thus extinguishing its *right* of surface access. In its place stands only the compatibility provision – an opportunity, shared in common with the public at large, to request *permission* for surface access. At that moment, petitioner's easement – its *land* – was confiscated by the government and petitioner was physically excluded from its property (as the government's ousting of petitioner's lessee dramatically illustrates). The Federal Circuit thus erred in holding that OSM's action would not be "final" until petitioner had requested and been denied permission according to a compatibility determination.

Second, the Federal Circuit's "ripeness" determination was erroneous even if petitioner's taking claim should be analyzed as a regulatory taking rather than a physical taking. The Federal Circuit failed to appreciate the constitutionally significant difference between the status of petitioner's easement as a property right and the possibility of compatibility-based permission to use the surface to mine. Any grant of permission by the government would be irrelevant to petitioner's claim, for it could never restore petitioner's lost right of access. It is black letter law that the holder of an easement has a *right* of access; the holder of a license has nothing more than a temporary, often conditional privilege of access. It is black letter law, too, that in light of this fundamental distinction, easements are distinct and traditional interests in land protected by the Fifth Amendment, and licenses are neither property nor constitutionally protected. *See, e.g.*, App. at 18a-23a; 2 JULIUS L. SACKMAN & RUSSELL D. VAN BRUNT,

---

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir. 1989)); *Milliken v. Town of Addison*, No. 02-1164, 2002 U.S. Dist. LEXIS 17237 (N.D. Tex. Sept. 13, 2002) (following *Hall*).

NICHOLS ON EMINENT DOMAIN § 5.07[2][a]-[b] (3d ed. 2005) ("To entitle the holder to compensation, the easement must be an enforceable one and not a mere privilege enjoyed at the will of the owner of the servient tenement. [Otherwise], there is no easement, only a license to use the property, and that license confers *no interest* that requires compensation.") (emphasis added).

It is clear, then, that by denying petitioner VER status and substituting the possibility of access only with permission under a discretionary compatibility determination, the government converted petitioner's easement – that is, its right of access – into an opportunity to request a license – that is, permission to access. The government thus converted petitioner's property into non-property. *See, e.g.*, *Slavitt v. Ives*, 303 A.2d 13, 16-18 (Conn. 1972) (The taking of the right of access occurred when the state filed the certificate of taking, even though the state "permitted [the right holder] to continue in the use and occupancy" of the property, because "the uncertain nature and consequent questionable value of continued tenure under such circumstances are obvious.").[9]

In short, the government's taking of petitioner's easement was complete when it denied petitioner VER status, and a favorable compatibility determination cannot restore the lost easement.[10] As the CFC correctly observed in this case:

---

[9] As discussed above, petitioner does not challenge the government's regulatory power. *See supra* pp. 16-17.

[10] If the government's actions do not qualify as a physical taking, so that the *Penn Central* balancing test for regulatory takings controls, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), and if compatibility determinations are relevant to ascertaining whether a taking has occurred, then the government can easily acquire nearly all of petitioner's 35,611 acres piecemeal by denying applications for compatibility for each successive mining site, since each such denial of the right of access would affect only a small fraction of petitioner's total property.

> This compatibility proviso does not magically transform what would otherwise be a taking. Simply because the Secretary has the discretion to grant a permit to applicants such as [petitioner] does not alter the fact that as a result of the enactment of SMCRA and the December 3, 1980 letter, the property rights previously held by [petitioner] were transferred to the government. When the owners' rights over the parcel change through government action, then a taking has occurred. Its occurrence or non-occurrence is not resolved on the basis of whether an alternative mechanism, such as a compatibility provision, would permit the owner to seek permission to do what he was entitled to do with his parcel prior to the taking.

App. at 17a.

Finally, in an earlier related case, the Sixth Circuit stated that the ripeness issue would be resolved upon a VER determination. App. at 91a. Because that case involved the same parties and the same issue as this case, the Sixth Circuit's ruling that petitioner's taking claim would be ripe upon a VER determination must be given legal effect in this case. Relying on the Sixth Circuit's directive, petitioner pursued the only available administrative mechanism to establish the validity and existence of its easement: a VER determination. Having been denied VER status, it is clear that petitioner's taking claim is ripe.

IV. The Federal Circuit's Ruling Is Contrary To The Standards Recently Enunciated In *Lingle v. Chevron U.S.A. Inc.*

The Federal Circuit's decision also conflicts with this Court's subsequent decision in *Lingle*. *Lingle* clarified the overriding framework for a takings analysis and compels the conclusion that a compensable taking occurred in this case.

Writing for a unanimous Court, Justice O'Connor explained in *Lingle*:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government *directly appropriates private property or ousts the owner from his domain*. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

125 S. Ct. at 2082 (emphasis added). The Federal Circuit simply ignored the question whether the government's confiscation of petitioner's easement, and its concomitant arrogation of the right to exclude petitioner from the government's surface estate, was a "classic taking in which government directly appropriates private property." *Id.* Instead, the Federal Circuit assumed that any governmental action that did not result in a physical invasion should be analyzed as a regulatory taking. As demonstrated above, however, just such a physical occupation by the government occurred when the government unilaterally ousted petitioner's lessee from the land and enhanced its own rights in the surface.

But even if the Federal Circuit were correct that no such physical invasion has taken place, the Federal Circuit artificially narrowed the category of classic per se takings. As *Lingle* makes clear, whenever government appropriates property for itself, a taking has occurred and just compensation must be paid. That is exactly what happened here when the federal government claimed for itself the right to exclude petitioner. The Federal Circuit ignored this reality, unduly constricting the range of classic per se takings.

Given that regulatory takings are the subject of a fact-specific balancing of interests under the test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), the Federal Circuit's ruling, if allowed to stand, would significantly expand the government's ability to appropriate land for itself. *Lingle* forecloses such a result. Given the Federal Circuit's exclusive jurisdiction over takings claims against the government filed in the Court of Federal Claims, it is important that its takings jurisprudence be harmonized with this Court's takings analysis as explained in *Lingle*. If the Court declines to grant plenary review, it should grant this petition, vacate the decision below, and remand for further consideration in light of *Lingle*.

V. This Case Has Profound National Implications.

The decision of the Federal Circuit, if allowed to stand, will have broad and far-reaching consequences. An OSM spokesman characterized the decision as follows: "From an agency perspective, this is probably the most significant 'taking' decision ever to come out of federal court." Mueller, *supra* p. 4, at D1 (quoting Jim Taitt). The spokesman is clearly correct, because in this case, for the very first time, the United States has unilaterally declared long-standing property rights to be invalid and non-existent, claimed those rights for itself, and not been required to pay compensation.

The principles involved in this case will apply to private easements on all government property, not just mining properties. Any regulatory body – federal, state, or municipal – will be empowered to declare such easements invalid so long as it holds out an opportunity to grant the now-former easement holder *permission* to do whatever the easement had formerly secured as a matter of right. Any exercise of this newly created government power would diminish, if not destroy, the value of the property to which the easement provided access. If government can substitute a discretionary license procedure for a private

property right without paying just compensation, the Fifth Amendment will no longer have any effect for an important class of property rights.

The Federal Circuit's decision will also have severe consequences for government's ability to form contracts. If government can unilaterally repudiate, without Fifth Amendment liability, contractually guaranteed property rights, few will be willing to enter into a contract with government. *See United States v. Winstar Corp.*, 518 U.S. 839, 883-85 (1996).

Perversely, the Federal Circuit's decision will impair the government's conservation efforts. The federal government has long expanded the national forest system by purchasing only surface rights. If the government is allowed to extinguish petitioner's easement without compensation, then no property holder will be willing to part solely with the surface rights. The government will be forced to purchase the entire fee at greatly increased cost or simply forgo the opportunity to expand the national forest system and other public lands.

Finally, the Federal Circuit's ruling threatens the balance of federalism by undermining the bedrock proposition that the scope of property interests is governed by state law. *See Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). Here, the scope of petitioner's right under Kentucky law is not disputed. But by holding that petitioner's right could be completely eliminated without compensation, the Federal Circuit effectively held that the easement is not property. Allowing federal courts to redefine state-created property interests would have profound national implications because property owners could never be sure when the federal government would change the nature and scope of their traditional state-created property rights.

The sweep of the decision below is breathtaking. The Federal Circuit offered no limiting principle for its holding, and there is none. Such an attack on the core principles of the Fifth Amendment should not be allowed to stand.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. Alternatively, if the Court declines to grant plenary review, it should grant the petition, vacate the decision below, and remand for further consideration in light of *Lingle*.

Respectfully submitted,

BRUCE F. CLARK
Counsel of Record
JUDITH A. VILLINES
MICHELE M. WHITTINGTON
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
(502) 223-3477

CHARLES J. COOPER
DAVID H. THOMPSON
DAVID M. LEHN
COOPER & KIRK, PLLC
Suite 200
1500 K Street, N.W.
Washington, D.C. 20005
(202) 220-9600

Counsel for Petitioner

APPENDIX
TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Federal Circuit below, *Stearns Co. v. United States*, 396 F.3d 1354 (Fed. Cir. 2005) 1a

Opinion of the United States Court of Federal Claims below, *Stearns Co. v. United States*, 53 Fed. Cl. 446 (2002) 9a

Opinion of the United States Court of Federal Claims Denying Motions for Summary Judgment, *Stearns Co. v. United States*, 34 Fed. Cl. 264 (1995) 59a

Opinion of the United States Court of Federal Claims Granting Plaintiff's Motion for Reconsideration, *Stearns Co. v. United States*, 58 Fed. Cl. 229 (2003) 80a

Opinion of the Supreme Court of the United States, Denying Certiorari, *Stearns Co. v. Hodel*, 474 U.S. 900 (1985) 84a

Opinion of the United States Court of Appeals for the Sixth Circuit, *Ramex Mining Corp. v. Watt*, 753 F.2d 521 (6th Cir. 1985) 85a

Opinion of the United States Court of Appeals for the Federal Circuit, Denying Petition for Panel Rehearing and for Rehearing *en banc*, *Stearns Co. v. United States*, Case No. 04-5031 (filed Apr. 25, 2005) 93a

Surface Mining Control and Reclamation Act, Section 522, 30 U.S.C. § 1272 (2005) 95a

Testimony of James W. Boyd, July 16, 1998 ..... 101a

Testimony of Charles L. Mills, Oct. 14, 1998 ..... 106a

United States Court of Appeals for the Federal Circuit

04-5031

THE STEARNS COMPANY, LTD.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Bruce F. Clark, Stites & Harbison PLLC, of Frankfort, Kentucky, argued for plaintiff-appellee. With him on the brief were *Judith A. Villines* and *Michele M. Whittington*.

Katherine J. Barton, Attorney, Appellate Section, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief were *Thomas L. Sansonetti*, Assistant Attorney General, *Silvia Sepulveda-Hambor* and *Kathryn E. Kovacs*, Attorneys. Of counsel on the brief was *Daniel W. Kilduff*, Office of the Solicitor, United States Department of the Interior, of Washington, DC. Of counsel was *Kelly A. Johnson*, Deputy Assistant Attorney General.

John D. Echeverria, Georgetown Environmental Law & Policy Institute, Georgetown University Law Center, of Washington, DC, for amicus curiae Kentucky Resources Council, Inc.

Timothy J. Dowling, Community Rights Counsel, of Washington, DC, for amici curiae International Municipal Lawyers Association and The National League of Cities. Of counsel on the brief was *Jason C. Rylander*.

Appealed from: United States Court of Federal Claims

Senior Judge Loren A. Smith

DECIDED: January 28, 2005

Before CLEVENGER, SCHALL, and GAJARSA, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

The United States appeals the judgment of the Court of Federal Claims that provisions of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. §§ 1201-1328, effected a taking of Appellee's mineral rights. *See Stearns Co. v. United States*, 53 Fed. Cl. 446 (2002). Because the Court of Federal Claims erred in concluding that SMCRA produced a physical taking of Appellee's mineral rights and because a claim that SMCRA caused a regulatory taking is not ripe, we reverse.

I

This case involves property that is currently part of the Daniel Boone National Forest. In 1937, Appellee sold the surface rights to the property to the United States. 53 Fed. Cl. at 447. By deed, Appellee retained in perpetuity the mineral rights consisting of "all metalliferous metals, coal, oil, gas, and limestone," *id.*, which the parties accept under Kentucky law "carries with it an implied appurtenant easement for the use of the surface giving the holder the right to access and use the surface for the purpose of removing [the] minerals." *Id.* at 452.

Thereafter, in 1977, Congress enacted SMCRA the purpose of which is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a); *Hodel v. Va. Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 268 (1981). SMCRA is administered by the Office of Surface Mining Reclamation and Enforcement ("OSM"). *Hodel,* 452 U.S. at 268-69.

SMCRA prohibits surface mining, including surface activity associated with underground mining, in national forests unless the party seeking to mine has "valid existing rights" ("VER") or where "the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations." 30 U.S.C. § 1272(e)(2) (2000). A party has VER where permits to conduct mining were secured, or in good faith applied for, before SMCRA was enacted. 58 Fed. Cl. at 449.

Appellee leased its mineral interest to Ramex Mining Corporation ("Ramex") in 1980. *Id.* at 448. To access the minerals, Ramex needed to disturb the surface of the national forest property. OSM advised Ramex that it needed to submit an application so that OSM could determine whether Ramex had VER, and if not, make a compatibility determination. *Id.* Ramex initially sought a compatibility determination, but Appellee, pursuant to the terms of the lease, demanded that Ramex withdraw the application. *Id.* In 1986, OSM determined that Appellee does not have VER. *Id.* at 449. Appellee did not subsequently seek a compatibility determination, deciding instead to bring suit in the Court of Federal Claims claiming that the denial of VER constituted a taking of their property.

The Court of Federal Claims agreed with Appellee, concluding that in implementing SMCRA the United States caused a "physical taking by operation of law." *Id.* at 447. According to the Court of Federal Claims, a physical taking occurred when the United States adopted the "good faith, all permits test" for VER, which, also according to the Court of Federal Claims, abolished Appellee's surface easement and therefore its "right to mine." *Id.* at 450-51. The Court of Federal Claims was unimpressed with the United States' argument that SMCRA acted only as a regulatory framework and that the provision permitting mining in the event of a favorable compatibility determination was a regulatory mechanism for allowing Appellee or its lessee to mine the property in question. The United States appeals. This court has the power to hear appeals from final decisions of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3) (2000).

II

Whether a taking has occurred is a question of law based on factual underpinnings. *Wyatt v. United States,* 271 F.3d 1090, 1096 (Fed. Cir. 2001). We conduct a plenary review of the legal conclusions of the Court of Federal Claims while reviewing its factual conclusions for clear error. *Id.* The facts of this case are not in dispute.

The United States argues that the facts of this case cannot give rise to a physical taking and to the extent they might support a regulatory taking, such a claim is not yet ripe because there is no final administrative decision on whether Appellee can mine. Appellee counters that the determination by OSM that it did not have VER was the act that effected the taking because it unilaterally

transferred the surface easement from Appellee to the United States. Accordingly, Appellee argues that there is no need to seek a compatibility determination, which under Appellee's theory is irrelevant to the taking inquiry.

A

The application of SMCRA to Appellee's mineral property and accompanying implied appurtenant easement is not a physical taking. A physical taking occurs "when the government itself occupies the property or '*requires* the landowner to submit to physical occupation of its land.'" *Forest Props., Inc. v. United States,* 177 F.3d 1360, 1364 (Fed. Cir. 1999) (quoting *Yee v. City of Escondido,* 503 U.S. 519, 527 (1992)); *see also Tuthill Ranch, Inc. v. United States,* 381 F.3d 1132, 1135 (Fed. Cir. 2004) (explaining that physical takings require physical possession).

Here, the government has not occupied Appellee's mineral property or the accompanying implied appurtenant easement. Also, the government has not required Appellee to accept the physical presence of a third party on any of the property. Appellee's argument to the contrary is little more than an incredible attempt to transform a regulatory taking claim into a per se physical taking. Under Appellee's theory, the implied appurtenant easement that attends the mineral estate creates a power in Appellee to be free from regulation that addresses the circumstances of access to that mineral estate.

It does not. For that reason, Appellee's complaint that it has been ousted from its easement, or that its easement has been taken or extinguished because Appellee does not have VER and must submit to a compatibility determination is

not tenable. As the Supreme Court has held, SMCRA is facially constitutional. *See Hodel,* 452 U.S. at 275-305. Accordingly, the question is not whether the government can regulate, but whether government regulation produces a taking. What remains is the question of the extent to which government regulation interferes with the economic use of the property. This is a classic example of a regulatory taking problem, not, as the Court of Federal Claims believed, an example of a physical taking.

B

Once viewed from the proper perspective, *i.e.,* as a claim for a regulatory taking, it becomes clear that Appellee's claim is not ripe. The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126 (1985) (citing *Hodel*). When the regulatory framework provides for the procedures through which a property owner can obtain permission to use the property, the deciding agency may ultimately permit the property owner to use the property as desired. *Id.* at 127. Consequently, the general rule is that a claim that government regulation has taken the economic viability of a property "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 186 (1985).

As noted above, the SMCRA regulatory scheme requires that Appellee get administrative permission to disturb the surface of the national forest. Relevant to this

case, that permission can be obtained by one of two avenues: (1) showing that the landowner has VER or (2) obtaining a favorable compatibility determination.

Here, Appellee sought and was denied the status of a property owner with VER. Appellee has decided not to challenge the administrative interpretation of VER or the application of that interpretation to its property. Failure to obtain VER status has not, however, defeated Appellee's expectation that it may use the property in question. To the contrary, Appellee may still obtain permission to use its easement and access the mineral estate by seeking a compatibility determination. Thus, this is not a case where a property owner's decision to avoid the remaining administrative procedures can be excused as futile. *See Greenbrier v. United States,* 193 F.3d 1348, 1359 (Fed. Cir. 1999). There is no dispute that OSM has the authority, by application of the compatibility provision, to permit the use that Appellee seeks.

III

In summary, the Court of Federal Claims erred when it determined that a physical taking occurred when OSM determined that Appellee did not have VER. At no time was Appellee required to suffer the physical occupation of either the government or a third party on either the mineral estate or the implied appurtenant easement. Furthermore, by refusing to seek a compatibility determination, Appellee prevents this court from knowing whether or to what extent the agency will restrict the use of the property at issue. A determination by OSM that Appellee's proposed mining is not incompatible under 30 U.S.C. § 1272(e) and 30 C.F.R. § 761.5 could allow Appellee

to use its easement and mine its mineral estate. OSM has not made a final determination. Thus, to the extent the Court of Federal Claims viewed this case as presenting a regulatory taking, it erred in finding a taking as a claim for a regulatory taking is not ripe for review.

For the reasons discussed above, the decision of the Court of Federal Claims is reversed.

REVERSED

In the United States Court of Federal Claims

No. 594-89 L Filed August 5, 2002

* * * * * * * * * * * * * * * *

THE STEARNS CO., LTD., *Plaintiff,* v. **UNITED STATES,** *Defendant.*	* Fifth Amendment; Just Compensation; Kentucky Property Law; Doctrine of Dominance; Physical Taking; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq.*; Ripeness; Statute of Limitations; Damages.

* * * * * * * * * * * * * * * *

Bruce Clark with *Judith Villines* and *Michelle Whittington*, of Frankfort, Kentucky, for plaintiff.

Silvia Sepulveda-Hambor, General Litigation Section, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C., for defendant. Daniel Kilduff, Office of the Solicitor, Washington, D.C., and Courtney Shea and Charles Gault, United States Department of Interior, Office of Solicitor, Knoxville, TN, were of counsel.

OPINION

SMITH, Senior Judge.

Introduction

Plaintiff originally owned valuable coal, which it intended to mine. It also owned the surface land. After

selling the surface land to the federal government in 1937, reserving its coal and mineral rights, plaintiff continued to mine the property for many years. In doing this it complied with all federal and state mining and environmental regulations. Under Kentucky law, coal is a dominant estate. This means that the coal owner has the right to mine, with underground mines, despite the wishes of the surface owner. In fact, the surface owner must take no action that interferes with the coal owners ability to mine its coal. Of course, all mining must comply with appropriate regulations, but that is not at issue in this case.

What is at issue is the fact that the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Public Law 95-87, 30 U.S.C. §§ 1201 *et seq.*, reversed the basic structure of rights between surface and subsurface owners. After SMCRA, plaintiff coal owner could only mine with the permission of the surface owner. This permission is not a regulatory action. The government now has a purely discretionary power to benefit its property at the expense of the plaintiff's property. The power appears to be governed by no standards; however, the court assumes that the Secretary could not use the discretion irrationally to discriminate against an applicant on the basis of race or religion, or other invidious reason. However, the discretion is broad enough to determine that the property owner's rights are subservient to the public's rights. This effectively destroys existing Kentucky property rights.

The government argues that the compatibility determination required by the SMRCA scheme is not a taking because it has never denied a request to mine and that this case is not ripe because plaintiff has never sought a compatibility determination. All of this misses the point. Ownership and use are not synonymous. The fact that my

neighbor always lets me use his lawnmower does not mean I own it. In this case, plaintiff's ownership has been effectively made subservient to another owner's property, in this case that of the United States. This is a physical taking by operation of law. As noted previously by this court, the government of our free people rarely takes anything by physical force. *See Hage v. United States*, 51 Fed. Cl. 570 (2002). This is no exception. The taking was achieved here by a statute that eliminated traditional property rights. Therefore, plaintiff must be compensated under the Fifth Amendment.

This opinion is issued following a well-litigated trial held both in Lexington, Kentucky and Washington, D.C., and the conclusion of closing arguments and post-trial briefing.

FACTS

In 1937, Stearns Coal and Lumber Company, now known as The Stearns Company, transferred its surface rights in approximately 47,000 acres in McCreary and Wayne Counties, Kentucky to the United States. The property was to be used as a national forest under the management of the United States Forest Service (USFS), pursuant to the Weeks Act of 1911, c. 186, 36 Stat. 961, (codified as amended in scattered sections of 16 U.S.C.). The area became part of the Cumberland National Forest, which was later renamed the Daniel Boone National Forest. Stearns' deed reserved "all metalliferous metals, coal, oil, gas and limestone in, upon and under" the 47,000 acres "in perpetuity." Tr. Trans. at 168-172 (Gable); Pl. Ex. 140. The deed went on to provide that "all operations for mining and removing same shall be done and carried on in

accordance with the following rules and regulations prescribed by the Secretary of Agriculture." Pl. Ex. 140. The Secretary's 1911 Rules and Regulations were all included in the text of the 1937 deed, except for one regulation exempting Stearns from compliance with any laws, rules or regulations established subsequent to this agreement. Pl. Br. at 22, n.15. From 1937 until 1975 Stearns continuously operated underground mines and support facilities on the 47,000 acres, known as Tract 1874, in cooperation with the Forest Service and in compliance with the 1911 Rules and Regulations.

The Office of Surface Mining Reclamation and Enforcement (OSM) was charged with implementation of SMCRA's provisions, after its enactment on August 3, 1977. Section 522(e)(2) of SMCRA, 30 U.S.C. § 1272(e), states in pertinent part:

> After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted –
>
> * * *
>
> (2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and –

The Act goes on to state that,

> (A) surface operations and impacts are incident to an underground coal mine; . . . .

Stearns leased 8,300 acres of Tract 1874, now within the Daniel Boone National Forest, to Ramex Mining Corporation in November 1980. Ramex obtained underground coal mining permits from the Kentucky Department for Natural Resources and Environmental Protection, obtained approval from the USFS, and began mining operations. On December 3, 1980, however, Ramex received a letter from OSM advising that it could not "commence [mining operations] prior to a determination by the Office of Surface Mining that Ramex has 'valid existing rights' to mine the involved lands." The letter stated that surface coal mining is not allowed on federal lands in a National Forest unless the miner has valid existing rights and underground mining is permitted only "where the surface effects are found not to be incompatible with significant recreational, timber, economic, or other values." The letter stated that OSM was looking forward to "receiving Ramex's application for a determination of valid existing rights or a compatibility finding in the near future prior to the commencement of operations."

Ramex ceased operations and sought a compatibility determination. Soon thereafter, pursuant to the terms of its lease agreement, Stearns requested that Ramex withdraw its request for a compatibility determination and Ramex did so. In a January 16, 1981 letter, OSM restated its earlier position and added that "any mining or reclamation activities not authorized in previous correspondence to your company would be considered a violation of the Act, thus requiring appropriate enforcement action." Ramex continued to mine. On February 11, 1981, OSM ordered Ramex to cease mining for 30 days for conducting coal mining operations within a National Forest without having complied with Section 522(e)(2), and for reclamation violations.

Ramex did not reapply for a compatibility determination based on its belief that the OSM actions under SMCRA did not apply to its mining operations.

Stearns and Ramex argued in United States district court[1] and on appeal that the surface effects of their deep mining operations would not take place on "federal lands" and, thus, were not included under SMCRA. *Ramex v. Watt*, 753 F.2d 521 (6th Cir. Ky. 1985). Instead, they argued, those effects would be limited to Stearns' privately-owned mineral estate including its easement across and through the surface as reserved in the 1937 deed. At that time the plaintiffs argued that failure to so recognize Stearns' easement would constitute a compensable taking under the Fifth Amendment. The district court and the Sixth Circuit ruled that the taking claim would not be ripe until Stearns exhausted the administrative remedies available under the Act, namely a determination by OSM as to whether Stearns possessed "valid existing rights" (VER).

The test for VER at that time was the "good faith, all permits test" under which one must have secured, or in good faith applied for, all permits required to conduct mining prior to the enactment of SMCRA on August 3, 1977. Def. Br. at 3, n. 2; *see* n. 2 *infra*. Stearns did not have permits but, pursuant to the Sixth Circuit's ruling, nevertheless sought

[1] Ramex, rather than pursue the administrative review and adjudication process provided by SMCRA, sought a declaratory judgment that it was entitled to mine coal under the Daniel Boone National Forest. Eugene E. Siler, Jr., Chief Judge, United States District Court for the Eastern District of Kentucky, rendered a partial declaratory judgment holding that plaintiffs' proposed mining would occur under and on federal forest land and, thus, fell under § 522(e)(2). He then dismissed at plaintiffs' request so that plaintiffs could appeal from the declaratory judgment. *Ramex v. Watt*, 753 F.2d 521 (6th Cir. Ky. 1985).

recognition of its valid existing rights. On December 3, 1986, OSM determined that Stearns lacked valid existing rights to mine. Stearns brought this suit in the Court of Federal Claims contending this denial was a taking of their property.

DISCUSSION

I. JURISDICTION

The government argues that plaintiff's taking claim is barred by this court's six year statute of limitations since OSM's letter to Ramex was dated December 3, 1980 and plaintiff did not file its taking claim until 1989.

The court finds that the statute of limitations was tolled while plaintiff argued in district court and in the Sixth Circuit that its deep mining rights were not "on federal lands" and, alternatively, asserted its taking claim in those courts. Those very courts held that Stearns' taking claim was not ripe until the company obtained a determination as to "valid existing rights." Stearns then complied with that requirement. To argue that the statute of limitations bars plaintiff's claim would mean that plaintiff could never bring a taking claim. The claim, under the government's theory, would not be ripe until the VER determination had been appealed, and by that time, the statute of limitations would have expired. When this sequence appears in a comedy, it is ludicrous. When it appears as a legal argument, it is simply unjust.

Accordingly, the court finds that Stearns' taking claim was timely filed in this court, less than three years after OSM's determination that Stearns lacked "valid existing rights." Furthermore, the court finds that Stearns had

existing property rights when Ramex's mining operations were curtailed by OSM's December 3, 1980 letter. The negative VER determination denied Stearns and its lessee the right to mine. It was the critical event. Whether the compatibility determination allowed plaintiff to mine as an act of grace was irrelevant to this issue. Allowing someone permission to use the property you took from them does not undue the taking.

The government's assertions would put Stearns in a classic Catch-22 situation. On the one hand, had Stearns filed a takings claim prior to determining its valid existing rights or obtaining a compatibility determination then the government would have argued that plaintiff's action is premature. On the other hand, despite the fact that it claims no taking occurred, the government argues that plaintiff's cause of action arose in 1980 upon receipt of the December 3 letter and that as a result, plaintiff's 1989 filing is out of time. The government's statute of limitations defense must fail. It is also inconsistent with government's own position in this case.

II. ANALYSIS

SMCRA section 522(e)(2) allows certain surface operations and impacts on federal lands which are incident to an underground coal mine within the boundaries of a national forest. Such surface operations and impacts, however, are permitted only in two exceptional situations, first pursuant to VER or second, lacking VER, "if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations." 30 U.S.C. § 1272(e) (1986 & Supp. 2002).

This compatibility proviso does not magically transform what would otherwise be a taking. Simply because the Secretary has the discretion to grant a permit to applicants such as Stearns does not alter the fact that as a result of the enactment of SMCRA and the December 3, 1980 letter, the property rights previously held by Stearns were transferred to the government. When the owners' rights over the parcel change through government action, then a taking has occurred. Its occurrence or non-occurrence is not resolved on the basis of whether an alternative mechanism, such as a compatibility provision, would permit the owner to seek permission to do what he was entitled to do with his parcel prior to the taking. Moreover, in this case, plaintiff's property had already been taken by government action before the compatibility proviso became relevant to the proposed mining operation.

Surface mining, as defined in SMCRA, is not just strip mining. It includes surface operations and impacts that are necessarily incident to underground mining. *See* 30 U.S.C. § 1291(28) (1986 & Supp. 2002). Stearns would have conducted such surface operations and caused such impacts, including, transporting coal over the surface and accessing its subterranean coal through the surface.

With two exceptions, SMCRA was meant to prevent surface mining on federal lands in national forests. The first exception is based on valid existing rights. Those who have VER are simply exempted from the prohibition against surface mining. If OSM had determined that Stearns had VER, Stearns or its lessee would have been able to mine since all mining permits were in place. Although the government has not shown that Stearns' rights, as established by the 1937 deed, were invalid, it suggests that at some point those rights ceased to exist,

notwithstanding the fact that they were clearly preserved "in perpetuity." That point when Stearns' rights ceased to exist could only have been when OSM arbitrarily imposed a "use it or lose it" standard for VER, the "good faith all permits test."

The second exception to SMCRA's prohibition on mining on federal lands is based on the compatibility proviso. Under this proviso, the Secretary of Interior can make a discretionary determination that the mining permit at issue would not be incompatible with the federal government's stewardship of the land in question. This is a discretionary determination and if made amounts to a waiver of SMCRA's mining prohibition.

The government argues that plaintiff's claim amounts to a facial, not an "as applied" challenge to SMCRA. According to the government, only a finding of non-compatibility could constitute a final decision for takings purposes. Defendant asserts that because Stearns caused Ramex to withdraw its request for a compatibility determination, its takings claim is not ripe. Furthermore, the government argues, had Ramex's request for a compatibility determination been allowed to proceed, a favorable determination would have been quickly made. Our deliberations do not turn, however, on the likelihood that the Secretary would have determined Stearns' proposed operations to be compatible with "significant recreational, timber, economic, or other values." Rather, they turn on the distinction between property rights and discretionary authority.

Stearns mined Tract 1874 for many years after deeding the surface to the United States, but stopped mining in 1975, before SMCRA was enacted on August 3, 1977.

Although it had reserved its right to mine in its deed to the United States, it did not have permits in place, nor had it applied for permits, at the time of SMCRA's enactment. At various times, including the present, the standard established by regulation for determining valid existing rights has been "the takings test."[2] On December 3, 1980, however, the standard was "the good faith, all permits test." Under this test one must have secured, or in good faith applied for, all permits required to conduct mining prior to the enactment of SMCRA. In applying that standard, OSM determined that Stearns lacked valid existing rights. Thus, OSM, pursuant to the statute and its implementing regulations, took away plaintiff's right to mine. This court has no authority to determine if this regulatory decision was right or wrong. However, the court does have a duty to determine whether Stearns had constitutionally protected property rights prior to the time of government action. It was undisputed that Stearns had valid and traditional property rights under both Kentucky and federal law to the property in question when OSM found that Stearns had no valid existing rights to mine.

Except for filing suit, Stearns' only option after determining it lacked VER would have been to file for an exception to SMCRA's prohibition on mining on federal lands based on the compatibility provision. The government makes

---

[2] *See, e.g.*, 48 Fed. Reg. 41,313 (1983): Relying upon the Act's legislative history, "valid existing rights" with regard to protected areas existing on the date of enactment, August 3, 1977, may be generally defined as property rights existing on that date which, if affected by the prohibitions established in section 522(e), would entitle the property owner to payment of just compensation under the "5th and 14th Amendments." *See also,* 30 C.F.R. § 761.5, Definition of valid existing rights (a) (1998).

much of the fact that Stearns did not pursue this option. However, as previously mentioned, this option is not the same as ownership. If Stearns had chosen this route, the Secretary may or may not have then granted what can best be described as a license to mine depending upon his determination as to whether or not such proposed surface operations were or were not compatible with "significant recreational, timber, economic, or other values." Pl. Br. at 26, Def. Br. at 13. Despite the fact that the government highlighted the apparent ease of obtaining compatibility exceptions, it is not the same as ownership. Mr. James Taitt testified for the government that "we would tell the companies, 'You can request valid existing rights, but to underground mine you don't need it.' All you need is a compatibility finding which is essentially a rubber stamp." Tr. Trans. at 2225 (Taitt). Mr. Taitt explained that OSM had issued 18 compatibility findings within the Daniel Boone National Forest since 1982 and that no requests have been denied. Tr. Trans. at 2207. In fact, another mining company, Blue Diamond, requested a VER determination but instead OSM issued a compatibility finding rather than "waiting for the VER process to run its course of action" Tr. Trans. at 2223 (Taitt). Even if compatibility findings are granted, this does not change the fact that Stearns' right to mine has been fundamentally altered by SMCRA and the government's subsequent regulatory actions.

Defendant explained that "[I]t is only as a consequence of Congress' desire to accommodate strip mining in western states that the language of Section 522(e)(2) in H.R. 25 was modified and the compatibility provision, incidentally, became applicable to the surface effects of underground mining." Def. Br. at 6. This may be the case,

and it may even be true that legislators expected that underground mining operations would have little or no problem obtaining compatibility determinations. Nevertheless, incidentally or otherwise, plaintiff was prevented from mining because of the government's determination that it lacked valid existing rights. The fact that an act of governmental grace or benefit may have returned, with respect to this parcel, the plaintiff's right to mine does not alter the denial of rights.

Stearns carefully preserved its mining rights when it sold the surface of the subject property to the United States in 1937. The owner of the Stearns Company, Mr. Gable, testified at trial that Stearns entered into a contract with the federal government to sell 47,000 acres of land for use as a national forest. Tr. Trans. at 55. The agreement, as manifested by the deed, was structured in such a way as to reserve plaintiff's rights in the minerals underlying the surface, thus establishing a severed estate with the government owning the surface rights and plaintiff owning the mineral rights. The 1937 deed of sale included express provisions allowing Stearns to recover such minerals, in this case coal, and use the surface land as is reasonably necessary according to good practice.

Mr. Gable's testimony and interpretation of the deed was supported by Carolyn S. Bratt, a Professor of Law at the University of Kentucky College of Law, who the court qualified as an expert witness in the area of Kentucky property law. Professor Bratt testified persuasively that the 1937 deed clearly established a severed estate under Kentucky law between Stearns and the federal government, with Stearns holding the dominant estate and the government owning the servient estate. Professor Bratt further testified that Kentucky, like all but one of the 50

states, follows the Doctrine of Dominance, which "carries with it an implied appurtenant easement for the use of the surface giving the holder the right to access and use the surface for the purpose of removing your minerals." Tr. Trans. at 910 (Bratt).

Accordingly, the court finds that under Kentucky law, plaintiff's carefully retained mineral estate included the right to access those minerals, over and through the surface, a dominant appurtenant easement. *See Imperial Elkhorn Coal Co. v. Webb*, 225 S.W. 1077, 1078 (Ky. 1920); Ky. Const. § 19 (mineral estate dominant); *McIntire v. Marian Coal Co.*, 227 S.W. 298, (Ky. 1921). Plaintiff had a valid easement and that easement constituted a property right which is protected under the Fifth Amendment. *See United States v. Welch*, 217 U.S. 333 (1910), *Lowndes v. United States*, 105 F. 838 (C.C. D.S.C. Cir. 1901).

Until it learned that its easement came within OSM's definition of federal lands and that its lessee, Ramex, could not mine without a compatibility determination, Stearns was free to offer its unencumbered easement, along with its mineral estate, for sale or lease to others. Once subject to OSM's unfavorable interpretation of the term "on federal lands" and, lacking "valid existing rights," it could no longer do so. At that point, the best option plaintiff could offer a potential purchaser or lessee was the right to seek permission to mine from the Secretary of Interior via the discretionary compatibility provision. The right to seek permission does not have much value in the marketplace. As stated in *Del-Rio Drilling*, "[T]he 'right' to exploit the minerals would be worthless without the additional right to access them. If the lessee of the mineral estate has to ask the owner of the surface for a right-of-way to access the minerals, then the lessee has no easement at

all." *Del Rio Drilling Programs, Inc. v. United States*, 35 Fed. Cl. 186, 195 (1996), *superseded by* 37 Fed. Cl. 157 (1997), *reversed on other grounds and remanded by* 146 F.3d 1358 (1998).

The government argues that "although Kentucky courts have joined with a number of states in holding that when a fee estate is severed into surface and mineral estates, the mineral estate is the 'dominant' estate and the surface estate the 'servient' estate, these are merely analytical labels which have significance only if a specific deed of severance is silent or unclear concerning the relative rights of the mineral estate owner and surface estate owner." Def's. Reply Br. at 24, n. 26. The government concludes that specific provisions of the 1937 deed limit the scope of Stearn's surface easement. By contrasting the largely unrestricted rights of the mineral owner under a "broad form deed," such as that at issue in *McIntire*, with the more restricted rights preserved in the Stearns 1937 deed, the government argues that Stearns "bargained away to the United States substantial control over its use of that easement." Def.'s Reply Br. at 28 (citing Professor Rivkin, Tr. Trans. at 3040, 3060). Still, the government's expert, Professor Rivkin, conceded that nothing in the Stearns deed actually eliminates the dominance of Stearn's mineral estate. Tr. Trans. at 3040-41.

With respect to strip mining, not underground mining, the District Court for the Eastern District of Kentucky stated that "it was never the intention of the parties that the mineral owner's (Stearns') rights to use the surface in the removal of minerals would be superior to any competing right of the surface owner (United States)." *United States v. The Stearns Co.*, 595 F. Supp. 808, 811 (1984). Stearns deed, at paragraph 8.2, provides for as much

disturbance of the surface as is "reasonable and necessary" for Stearns to mine its coal. On appeal, the Sixth Circuit found that this language did not mandate "subordination of the surface estate to the mineral estate." *United States v. The Stearns Co.*, 816 F.2d 279, 283 (6th Cir. 1987). The Sixth Circuit's finding that the 1937 deed did not allow strip mining did not necessarily mean, however, that Stearns did not otherwise hold the dominant estate. The Sixth Circuit opinions address Stearns' rights under the deed only in the context of its right to strip mine, not deep mine. The issue of Stearns' right to deep mine was not litigated before that forum and thus, is not relevant to the issue before this court. As both Professors Bratt and Rivkin testified, the 1937 deed confirms that Stearns holds the dominant estate for deep mining purposes.

Accordingly, the court now finds that the terms of Stearn's 1937 deed assured the company the right to deep mine. The deed's restrictions did not determine whether Stearns would be allowed to mine, they merely determined how it was to do so. The restrictions outlined in the 1937 deed were specific and related to the protection and preservation of the National Forest. Stearns was assured of its right to mine by complying with the deed terms.

SMCRA's compatibility proviso, on the other hand, is inconsistent with any right to mine. The Secretary may, at his discretion, deny permission to mine based on a whole new set of criteria not included under the 1937 deed.[3] Thus, the denial of VER effectively ended Stearns' rights

[3] The government's witness said he could never think of OSM denying compatibility because of a recreational problem but added, "You can never say never." Tr. Trans. at 2346 (Taitt).

to mine, replacing them with Secretarial discretion, based upon the Secretary's assessment of the effective or desirable use of the government's property.

A servient estate is not without rights and a dominant estate does not bestow the freedom to run roughshod over the rights of the servient owner. By relinquishing greater control to the United States than *McIntire* did in its broad form deed, Stearns did not render its mineral estate servient. It merely agreed to abide by certain provisions designed to protect the National Forest.

The government makes much of the fact that plaintiff agreed in 1937 to abide by regulatory restrictions on mining. The regulatory restrictions referenced in the deed, however, were known, and agreed to by plaintiff at that time. The Secretary of Agriculture's 1911 rules were fundamentally different than SMCRA and its implementing regulations. The 1911 rules referenced in Stearns' deed contemplated mining and merely dictated how mining would be conducted, not whether it would occur at all. Most importantly, the compatibility provision is not a mining regulation; rather it is a discretionary power Congress gave to the Secretary to determine whose use of the property takes precedence. Thus, this is not a *Winstar*-type case nor a regulatory taking case. Though, as noted below, there may be some analogy to a *Winstar*-type contract case.

In its deed Stearns agreed that "all operations for mining and removing [minerals] shall be done and carried on in accordance with the following rules and regulations prescribed by the Secretary of Agriculture." It incorporated "the following rules." It then restated, word for word, each of the Secretary's 1911 rules that were to be made part of the deed. Those rules clearly contemplated mining. For

example, rule two states "In prospecting for, and in mining and removing minerals . . . only so much of the surface shall be occupied, used or disturbed as is reasonable and, according to recognized good practice, necessary for the purpose." This language does not suggest that plaintiff was prepared to be denied its right to mine based on interference with recreational usage of the National Forest. Rule three calls for "reasonable and usual provisions" to support the surface above underground mines and requires that Forest officers be allowed to inspect for that purpose. Rule four calls for prevention of "obstruction, pollution, or deterioration of streams, lakes, ponds, or springs." The rule does not contemplate prohibiting mining to prevent pollution, however. Instead, it requires that "operators shall make provisions by ditches, pipes, pumps or other approved practical methods" to prevent pollution. Rules six and seven even contemplate "using" timber from the National Forest in the mining operation and merely requires that the operator pay for the timber and not cut, destroy, or damage forest growth "unnecessarily." Rules eight and nine contemplate "buildings, camps, roads, bridges and other structures or improvements necessary in carrying on mining." Even failure to remove such improvements merely results in their becoming the property of the United States. Rule ten requires the operator to clean up refuse and waste materials when the mining operation is complete.

While Stearns may have "bargained away" some of its rights, it did not relinquish its rights to underground mining. The language of the 1937 deed clearly reflects the fact that Stearns expected to mine. If Stearns had been faced in 1937 with a deal that gave the Secretary the ability to prevent mining, at his discretion, without

compensation, Stearns would have very likely declined to sell the surface to the government. The severed estate that was created by the 1937 agreement and deed has now been unilaterally modified by the government. Stearns has been deprived of its property and is entitled to compensation.

This is a case involving the taking of property, however it has some analogy to the contractual issues involved in the *Winstar* cases. The land sale in 1937 expressed the parties allocation of rights in the same physical space. Mineral rights and surface rights were established in a particular relationship. That was part of the "deal", unlike the more common land sale which involves no continuing relationship. Just as Winstar found no basis for the government to change the deal after the fact, the sale of property in this case can not be modified by one party *ex post facto*. *See U.S. v. Winstar Corp.*, 518 U.S. 839 (1996); *Mobil Oil Inc. v. U.S.*, 530 U.S. 604 (2000).

In summary, the court finds the government deprived Stearns of its mineral estate as reserved in the 1937 deed by its actions subsequent to the enactment of SMCRA. This deprivation effected a taking of Stearns property rights and thus just compensation is due.

III. RIPENESS

The government argues that Stearn's claim amounts to a facial, not an "as applied," challenge to SMCRA. D. Br. at 12, 13, 41, 42. According to the government, only a finding of non-compatibility could constitute a final decision for takings purposes. The government's assertion that a finding of compatibility was merely a rubber stamp, routinely bestowed, does not alter the fact that a finding of

compatibility is discretionary on the part of the Secretary and may also be denied. It is not a regulatory decision subject to rational standards. Rather, it is a new power given to one land owner over the property of another by government authority. The government argues that, because Stearns caused Ramex to withdraw its request for a compatibility determination, its taking claim is not ripe for judicial review. Contrary to the government's assertion, and as explained below, the court finds that plaintiff's claim is based on OSM's application of SMCRA and is ripe for our determination as to whether OSM's action resulted in a taking of plaintiff's property.

This taking occurred, not with the enactment of SMCRA, but at the implementation phase. The Act itself did not define VER or compatibility. It was only when the "good faith all permits test" was established as the standard for VER that Stearns lost its easement. But for that application, we would never have reached the question of whether plaintiffs' proposed mining was "compatible" under some undefined, discretionary standard known only to the Secretary of Interior. The "good faith all permits" definition of VER had the effect of foreclosing Stearns' and its lessee's right to mine, rights which previously had been held in perpetuity. It is not up to this court to determine whether the public purpose for this foreclosure was good or bad, for the court must accept that the government has the right to take property for public use. The other half of the 5th Amendment, of course, guarantees that such public use shall not be imposed on the property holder alone, but must in fairness and justice be shared by the entire public which benefits through the award of "just compensation." As the Supreme Court explained, the Takings Clause is triggered by governmental action which

forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

DAMAGES

I. Standard for Determining Just Compensation

Now that a taking has been found, this court must determine what dollar amount constitutes just compensation under the Fifth Amendment. *See Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973). In arriving at a figure, the court must put the owner in the same financial position as if there had been no taking. *See United States v. Reynolds*, 397 U.S. 14, 15 (1970). The proper measure for damages in a takings claim is the property's fair market value at the time of the taking. *See Foster v. United States*, 2 Cl. Ct. 426, 446 (1983). Fair market value is an amount determined in a negotiated transaction between a willing buyer and seller absent any compulsion taking into account the factors that well-informed persons would consider under similar circumstances and custom in the industry. *See United States v. Miller*, 317 U.S. 369, reh'g denied, 318 U.S. 798 (1943). An owner of property is entitled to have the fair market value of his property valued by its highest and best use. *See Olson v. United States*, 292 U.S. 246 (1934). In this case, it is undisputed that the highest and best use for this estate is as an operating mineral reserve and extraction property.

II. Valuation of the Stearns Estate

In this case, both parties presented testimony of expert witnesses who were similarly qualified as well as comprehensive and extensive supporting exhibits on the issue of damages. As is often the case, the parties presented widely divergent dollar amounts that would in their minds be just compensation. Plaintiff's experts testified that the damage award should fall in the $17-20 million dollar range whereas defendant's experts offered a much lower figure ranging between $2-3.5 million dollars. The court finds the government's damage model more credible on the whole, but not entirely persuasive. After carefully considering the evidence, the court finds that the plaintiff's estate had a market value of $5 million on the date of the taking, which the court finds to have occurred on December 3, 1980.

III. Amount of Coal in Reserve

Both plaintiff and defendant presented extensive testimony about the extent of coal in reserve. Mr. Mullenex, one of the government's valuation experts, testified that a maximum of 13.9 million tons of raw, recoverable coal lie in reserve. Tr. Trans. at 3286. In making his estimates, Mr. Mullenex relied on isopachous[4] mapping of coal thickness utilizing measurement data

---

[4] Isopach mapping is a map indicating, usually by means of contour lines, the varying thickness of a designated stratigraphic unit such as a coal seam. Dictionary of Mining, Mineral, and Related Terms, U.S. Bureau of Mines, Second Edition, U.S. Department of the Interior, 1996.

obtained from boreholes, outcrop[5] prospect points, and underground mine measurements. He analyzed coal seams #1, 1½, 2, and 3, all located on the subject property and found the following: seam #1 is nearly exhausted and that reserves lie in two small bodies totaling approximately 2 million tons; seam #1½ has no reserves at all; seam #2 holds the vast majority of the coal, about 11.1 million tons, or 81% of the total reserve potential; seam #3 has 0.5 million tons. Tr. Trans. at 3286.

On the other hand, Mr. Boyd, one of plaintiff's valuation experts, found much more coal in reserve, specifically 18.67 million tons in measured and indicated reserves that would be marketable. Tr. Trans. at 1091. Mr. Boyd based his conclusions on Stearns' company material, including coal seam measurements from bore hole drillings, outcrop measurements, and from maps of previous mining on the property. Although Mr. Boyd estimated that the total reserve was approximately 62.55 million tons, he offered the 18.67 million figure after subtracting the inferred tonnage due to the lenticular[6] nature of Stearns' property, deducting for coal reserves with less than 60 feet of overburden,[7] taking into account field recovery rates, and expected losses due to washing out impurities.

---

[5] The part of a rock or coal formation that appears at the surface of the ground. Webster's New Collegiate Dictionary, 1977.

[6] A lenticular seam resembles in shape the cross section of a lens, esp. of a double-convex lens. The term may be applied, e.g., to a body of rock, a sedimentary structure, or a mineral habit. Dictionary of Mining, Mineral, and Related Terms, U.S. Bureau of Mines, Second Edition, U.S. Department of the Interior, 1996.

[7] Overburden is rock including coal and (or) unconsolidated material that overlies a specified coal bed. Overburden is reported in

(Continued on following page)

Both Mr. Mullenex and Mr. Boyd relied on a coal reserve classification system developed by the U.S. Geological Survey (USGS).[8] The classification system provides three specific criteria for evaluating and classifying coal reserves [9] and provides an objective method for evaluating coal reserves and comparing various estimates. Although the classification is widely used, at trial both Mr. Boyd and Mr. Greenwald, for the plaintiff, testified that the USGS system is generally accurate within 20 percent plus or minus of the measured reserve. Tr. Trans. at 1044 (Boyd) and 1460 (Greenwald).

Mr. Greenwald, who had worked as a consultant for the Stearns Co., rejected the USGS's criteria for evaluating coal reserves and concluded based on his personal experience with the property that 44 million tons lie in reserve. According to Mr. Greenwald, applying the USGS criteria to the lenticular nature of the seams would result in an underestimation of the coal reserves. Mr. Greenwald developed his estimate by examining the historical mining records on the property to determine a yield-per-acre figure. In brief, Mr. Greenwald determined that 2,200 tons

---

feet and (or) meters and used to classify the depth to an underlying coal bed. Geological Survey Bulletin 891.

[8] See Gordon H. Wood, Jr. et al., U.S. Geological Survey, Circular 891, Coal Resource Classification System of the U.S. Geographical Survey (1983).

[9] The three criteria for classifying coal reserves are: measured, indicated, and inferred. A measured reserve is defined as "accessed and virgin coal that lies within a radius of ¼ mile of a point of thickness of coal measurement." Circular 891. An indicated reserve is defined as "virgin coal that lies between ¼ mile and ¾ mile from a point of thickness of coal measurement." *Id.* The inferred measure is defined as "virgin coal that lies between ¾ mile and 3 miles from a point of thickness of coal measurement." *Id.*

of coal would be recovered per-acre owned. He then multiplied this figure by the number of unmined acres to arrive at his 44 million ton estimate.

While Mr. Greenwald's view is an informed one based on his years of experience on the property, his reserve estimation approach is not widely used. Thus, the court finds that its emphasis on surface acres rather than coal reserves is the less satisfactory method. However, the court did find Mr. Greenwald a highly credible witness. The court agrees with the government that Stearns' estate should be valued by applying a price-per-ton unit of measure, as opposed to plaintiff's price-per-acre approach. First, the lenticular nature of the property belies the underlying premise of the price-per-acre approach that the coal beneath is somehow evenly or uniformly dispersed. As the government points out, coal has not been found to pervade the subsurface so it is more uncertain than necessary to extrapolate from the gross acreage and mining history the amount of coal that lies beneath. Second, a prospective purchaser will pay value based on how much coal he estimates lies beneath the surface, not on how many acres Stearns has access to, although there is admittedly some relationship between the two. Clearly Stearns mineral rights are valuable only insofar as there are minerals, not acres. Finally, given the fact that the USGS has provided specific criteria for classifying reserves, and these criteria are generally accepted in the industry, the court sees no reason to diverge from using them as benchmarks for evaluating the competing claims for coal reserves. Thus the court believes that the valuation emphasis should be placed on coal tons per whole property, not average tons per acre times total acres. That is not to say that Mr. Greenwald's testimony is without

value. To the contrary, the court takes notice of the fact that he has decades of experience on the property and in the coal industry, and his opinion that significant reserves exist is relevant.

On top of all of this is the unavoidable fact that the only certain way to determine how much coal lies in reserve is to mine it. While that option has been foreclosed by the government's taking, it would be unjust to allow this uncertainty to prevent Stearns from being adequately compensated for its loss. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) ("[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.") While here we are not dealing with a wrong, the plaintiff is the party that has suffered the loss. Neither party disputes the fact that valuable, marketable coal lies in reserve. The damages dispute centers on the quantity, quality, and fair market value of the coal reserves.

It is the court's view that plaintiff's estimates of coal on a per-acre basis for the entire property are less credibly supported and probably do not provide a reliable reference for comparison. Plaintiff estimates over three times as much coal as defendant using this method. On the other hand, Mr. Mullennex explained the importance of geological controls in projecting the coal reserve. Those controls influence the distribution of coal beneath the property, mining conditions, and coal quality. For example, Mr. Mullennex regarded thinning of the coal seams near the boundaries of previous mine workings as an indication that those seams were running out at that point and even suggested that the old workings stopped there for that reason. The thinning seams become progressively harder

to mine, costing more to operate and returning less over time, making them less valuable. In addition, Mr. Mullenex projected coal reserves outside established mines only when the data showed that coal was there, unlike Mr. Boyd who assumed coal lay in areas next to established mines.

Finally, as previously mentioned, the lenticular nature of the subject property prompts the court to exercise a conservative approach to measuring the coal reserves. At trial, experts for both sides agreed that the property was lenticular, but differed on the effect of this characteristic. Tr. Trans. at 1036 (Boyd), 1459 (Greenwald), 4041 (Naumann). In his testimony, Mr. Boyd downplayed the effect the lenticular nature of the property would have. He testified that when miners encounter lenticular seams they work around it and look for coal in some adjacent area. Tr. Trans at 1038. In support of this position, Mr. Boyd offered a section map of an underground mine in eastern Tennessee that was mined despite its lenticular seams. Pl. Ex. 21. On the other hand, Mr. Naumann, expert for the government, said that properties with lenticular seams are disfavored because they tend to result in a lower recovery rates and involve more risk. Tr. Trans. at 4041, 4550. The court agrees with defendant's expert that this characteristic depresses the coal reserve amount, as well as the fair market value of the property. Thus for the aforementioned reasons, the court finds that out of all the estimates presented, Mr. Mullennex's estimate of 13.9 million raw, recoverable tons is the closest approximation of what exists. (Def. Br. at 57, n.79.)

In further support of that finding, Mr. Naumann noted that Stearns, according to industry practice, had "higraded" its property, mining the best coal first. Mr. Naumann, using the royalty income approach estimated

that Stearns could have mined 677,000 tons of coal per year for 20 years, for a total of 13,540,000, consistent with Mr. Mullennex's estimate. Def. Br. at 62.

Despite the fact that the court finds that the government offered more credible evidence that there was not as much coal in reserve as Stearns' experts claimed, the testimony of Mr. Boyd, Mr. Greenwald, and Mr. Gable provides a basis for the court to adjust the government's amount upward. In addition, Mr. Gable, the property's owner, testified about the historical coal mining on the parcel and used this history to support his view that substantial amounts lie in reserve. Between 1903 and 1975, 35.8 million tons of coal were recovered from 26 different mines that were operated on this property. Pl. Ex's. 65,66. Mr. Gable testified that the coal was not always found where it was expected and that he found many of the topographic maps and other geologic aids did not predict where coal was later found. Tr. Trans. at 13. The USGS classification system itself acknowledges that its system for classifying reserves is accurate within 20 percent, plus or minus. The court feels that based on this evidence that an upward adjustment of 20 percent is reasonable, bringing the total reserve to approximately 16 million tons.

IV. Market Value of Coal in Reserve

Having found that approximately 16 million tons of coal lie in reserve, the court now must determine the value of that coal. Plaintiff and defendant offered multiple experts to the court who relied on different valuation theories for fixing the damage award. The damage theories include comparable sales analysis, discounted cash

flow analysis, royalty income stream, and personal experience. As the Supreme Court has recognized, the aforementioned valuation techniques will not result in an exact market valuation. *See United States v. Miller*, 317 U.S. at 374.

In this circuit for the purpose of determining fair market value, the fact-finder is not required to rely on comparable sales evidence should it be presented. *See Seravalli v. United States*, 845 F.2d 1571 (Fed. Cir. 1988). In that case, the Federal Circuit stated, "[W]e are unwilling to restrict the trial courts to any single basis for determining fair market value." *Id.* at 1575. The trial court has broad discretion to determine which valuation method is most appropriate given the facts of the case. *Id.*, *see also Sill Corp. v. United States*, 343 F.2d 411, 416 (10th Cir. 1965), cert. denied, 382 U.S. 840 (1965) (the law is not wedded to any particular formula or method for determining fair market value as the measure of just compensation). However, comparable sales are considered by the courts to be the best evidence of fair market value, and thus preferable to other forms of valuation, if comparable sales are offered. *See United States v. 50 Acres of Land*, 469 U.S. 24 (1984); *Kirby Forest Industries Inc. v. United States*, 467 U.S. 1 (1984).

In summary, based on comparable sales, for the plaintiff Mr. Greenwald valued the property at $18,830,675 and Mr. Pritchett valued the property at $18,695,000. For the government, Mr. Lipscomb valued the property at $2,250,000 based on comparable sales.

Relying on a discounted cash flow analysis, for the plaintiff, Mr. Pritchett arrived at a figure of $17,295,000 and Mr. Boyd estimated the property's value, based on the

royalty income stream and discounted cash flow, at $19.24 million. For the government, Mr. Hans Naumann valued the property at $3,408,272 based on the royalty income approach.

Mr. Gable, the owner of the Stearns Co., offered a figure of $20.1 million based on his personal experience with the property.

Despite the variety, the fact is that the valuation approaches are premised on the same basic factors, namely the quantity, quality, accessibility, and marketability of the coal in reserve. The estimates summarized above show that there is a roughly similar approximation in value between the various methods used by either side.

A. Comparable Sales

All land is naturally unique and presumed so under the law. *See Snowbank Enter., Inc. v. United States*, 6 Cl. Ct. 476, 484 (1984) (citing *U.S. v. 103.38 Acres of Land*, 660 F.2d 208 (6th Cir. 1981)). Stearns' property is no exception. Thus, comparable sales "have probative value only if the subject and comparison properties have similar characteristics and if the comparison sales are not too remote in time or place from the applicable date of valuation and the site of the subject property." *Id.*

Expert appraisers testified that properties that sold for between $1.5 million and approximately $26 million were valid comparables to Stearns' mineral estate. The appraisers made adjustments for time, condition, coal reserves, rail access, location, topography, coal quality, access, and mineability. Except for the amount and quality

of coal in reserve, the experts agreed for the most part about the characteristics of the subject property.

The following table summarizes in reverse chronological order the comparable sales offered by both sides during the trial.

Date of Sale	Parties	Location	Acres & Estimated Coal Reserve	Price	Relied on By Party/Expert
March 1987	Stearns to the United States	Kentucky	288 mineral acres	$160,000, or $554 per acre	Plaintiff/ Gable
October 1982	Blue Diamond to United States	McCreary County, Kentucky	7,500 coal acres	$4.7 million, or $580/acre	Plaintiff/ Gable
December 3, 1980	**Stearns Co. to United States via taking**	**McCreary County, Kentucky**	**47,000 mineral acres, 16 million tons**	**Undetermined**	
August 26, 1980	Kentenia Corp. to Pocahontas Dev. Corp.	Harlan/Bel 1 Counties, Kentucky	30,000 acres, 67 million tons	$20 million, or $637/acre	Defendant/ Lipscomb
June 2, 1980	R.G. Smith Trust and High Top Coal Co. to Koppers Inc.	Tennessee	31,500±acre non-contiguous tract in fee, 47 million tons	$26 million, or $897/acre.	Plaintiff/ Greenwald & Pritchett
July, 1979	Stearns to the United States	McCreary County, Kentucky	15,288 mineral acres	$7.4 million, or $550/acre	Plaintiff/ Gable
June 12, 1979	Harlan County Land Co. to Florida Power and Light	Harlan County, Ky. & Lee County Va.	33,184 acres, 130 million tons	$18.5 million, or $557/acre	Plaintiff/ Greenwald & Pritchett
January 2, 1979	Tennessee Land and Mining Co. to Koppers Inc.	Several Counties in Tennessee	65,000 acres, 70 million tons	$20 million, or $307/acre	Plaintiff/ Pritchett and Defendant/ Lipscomb
December 1977	Carroll Co. to Shamrock Co.	West Virginia	3,384 acres	$10 million, or $747/acre	Plaintiff/ Pritchett
June 15, 1977	Cumberland Mineral Co. to Greenwood Land and Mining Co.	Laurel & McCreary Counties, Kentucky	25,989±acres in mineral rights only	$1.5 million, or $57/acre	Defendant/ Lipscomb
May 10, 1976	Peabody Coal Co. to Harlan Land Co.	Kentucky and Virginia	33,569 acres, 150 million tons	$9.3 million, or $271/acre	Defendant/ Lipscomb
December 31, 1975	Stearns Co. to Blue Diamond Investment Co.	McCreary County, Ky.	24,855±mineral acres and 946±surface acres, 41 million tons	$4.8 million, or $554/acre	Defendant/ Lipscomb

15592AB50

Defendant avers that the comparable sales approach is most applicable in this case because there are comparable sales to consider and because the parcel had no operating mines at the time or cash flow. Def. Reply Br. at 54. Plaintiff put on evidence relying on comparable sales and other methods, but expressed no clear preference for any one approach.

Prior sales of the same land are the most persuasive evidence of fair market value. Unfortunately in this case that option is unavailable because the last sale of this particular property took place in 1937. What did take place close to the date of the taking were two sales between Stearns and the United States. Although sales between the same parties are not given the deference afforded to prior sales of the same land, they nonetheless deserve careful scrutiny, particularly because in this case they involve contiguous or nearly contiguous land.

The first of these two sales between Stearn's and the United States, a sale of 288 mineral acres for $160,000, took place in 1987 and is too remote in time and different in characteristics for the court to consider it comparable. The other sale is much closer to the mark. That sale took place in July, 1979, within 18 months of the taking in December, 1980, transferring 935 surface-only acres, 8,227 acres of mineral and surface land, and 7,060 mineral-only acres, for a total of 16,223, from Stearns to the United States for consideration of $7.4 million. Much like the original transaction in 1937, the purpose of this transaction was to set aside land for federal conservation and recreation areas, specifically for the Big South Fork National River Recreation Area. Presumably the government was interested in purchasing the land and mineral rights because large sections of it run alongside the banks

of the river on both sides, providing an ideal way for the government to prevent development along long sections of the South Fork river.

Mr. Gable testified at trial that this transaction was entered into willingly. The land was originally part of the larger Stearns estate, which prior to 1975 amounted to roughly 200 square miles in Kentucky and Tennessee. As Mr. Gable discussed at trial, in 1975 Stearns began to sell off large parts of its land and mining operations, including large chunks to Blue Diamond Investment Company.

What appears to have happened is that the parties agreed to split off parts of the Stearns estate closest to the river for buffer zones and then also incorporate the 8,227 acre surface and mineral estate, a large compact area along the southern border of Kentucky, for the recreation area. The court notes that this land abuts the Stearns mineral estate, which is the subject of this dispute. Pl. Ex's. 80, 90. It is generally true that land on one side of the fence shares many similar characteristics with the land on the other side. This is certainly the case here.

The government objected to the use of this sale as a comparable alleging that the sale was forced under threat of condemnation. The court allowed the evidence of the sale to come in at trial and finds that the sale should be considered as it does not fall into category of forced transactions. A forced transaction is disfavored in comparable sales analysis as it destroys the basic premise of fair market value. Here, the government approached Stearns about buying the parcel. Mr. Gable testified that this property included parts of all 4 coal seams, but that it was unlikely that Stearns would mine it, mainly because of the area's scenic features and poor accessibility. Tr. Trans. at

419-20. Not having operated mines in the area since 1975 and, as part of an overall diversification strategy, Stearns was interested in selling. The terms of the sale do not support the notion that the sale was forced. To the contrary, the consideration Stearns received for the parcel is a substantial sum, more than twice what the government feels is just compensation for the subject property despite being smaller and less compact. The court would note that if the government were right and the sale was "forced", the logical result would be that the price actually undervalued the property. This would, of course, benefit plaintiff!

The court finds this sale to be probative evidence of the value of the subject property. The sale involved the same parties, contiguous land, and closeness in time. The fact that it was not sold as a mining property does not diminish its comparability for it is evident that Stearns would not have sold for much less than what it could have received if it had sold the parcel to a mining enterprise. Without question the fact that this land runs alongside the river banks secured a premium price for Stearns and the subject property does not offer the same benefits. What the subject property does offer is similarly valuable: specifically proven coal reserves, accessible mines and good transportation access. No one disputes that the subject property has value.

Turning to a separate sale, Stearns sold a large parcel to Blue Diamond Investment Co. in 1975. Included in the sale were options to purchase additional Stearns lands over time. Blue Diamond exercised these options on September 18, 1979 and on March 18, 1981 and then in turn sold 7,500 coal acres of this land to the United States. The government paid Blue Diamond $4.7 million in October, 1982 and made this acquisition part of the Big

South Fork River Recreation Area. In support of his position that the subject property was worth $20.1 million, Mr. Gable testified that the subject property had better access to mineable coal and more proven reserves than the Blue Diamond property sold to the government, which in his view was inferior because it had been extensively mined and had poor rail access. Tr. Trans. at 430-31.

This sale is also probative evidence of the value of the Stearns estate. Although the sale was between Blue Diamond and the government, the land was previously owned by Stearns and as Mr. Gable testified, Blue Diamond's decision to exercise the option was driven not by its desire to exploit the minerals but to flip the property to the United States for a quick profit. Tr. Trans. at 278. The land is similar to the subject property in the following ways: 1) it is located in the same county; 2) it has many of the same topographical characteristics; 3) the sale occurred within an acceptable time frame for comparable sales purposes; 4) and it had potential as a mineral-bearing property.

In analyzing the comparable sales testimony, the court was struck by the lack of agreement among the experts on what sales were comparable. Out of the numerous sales presented, only one sale was relied on by all three experts, that being the January 2, 1979 sale of 65,000 acres in Tennessee to Koppers Co. for $20 million. The purchaser estimated that the property contained 70 million tons of coal in reserve of low to high quality steam coal. It was an active mining property composed of independent mining contractors who sold their coal to Koppers who in turn sold it to the consumer. According to the government's expert, other minerals in addition to coal were included in the

price. Of the $20 million price, the government attributed only $13.6 million for the 70 million ton coal reserve.

Applying the Koppers transaction to the subject property, there are several major distinctions, namely the number of acres, 65,000 acres in fee versus 47,000 primarily mineral acres, the amount of coal in reserve, 70 million tons versus 13-18 million, and the fee interest versus only mineral rights. These factors lead the court to believe that the Stearns property is not nearly as valuable as plaintiff claims it to be.

The other comparables relied on by plaintiff's experts also fail to persuade the court that the Stearns property is worth almost $20 million. Mr. Greenwald and Mr. Pritchett both relied on the June 1979 Harlan Land Co. and the June 1980 Smith Trust/High Top sale. Both of these properties are similar in size to Stearns' mineral estate but they were both sold in fee. In addition, the coal reserves on these two properties are substantially larger than the court's estimate for Stearns' property, 130 million tons for the Harlan Land Co., and 47 million tons for the Smith Trust sale.

Plaintiff's side offered comparable sales analysis relying on the testimony of Mr. Greenwald, Mr. Pritchett, and Mr. Gable. Taking into account these comparables and his own experience on the property, Mr. Greenwald estimated that the Stearns property would carry a price of $525 per acre, for a total of almost $18.8 million. Mr. Pritchett also concluded that the Stearns property was worth $525 per acre.

For the government, Mr. Lipscomb selected five property sales that sold at prices both higher and lower than his estimate for the subject property. This bracketing

approach is commonly used to hone in on the proper amount. The closest reserve in terms of amount was conveyed in the June 1977 sale, where according to Mr. Lipscomb 29,485,000 recoverable tons lie in reserve, almost twice the amount of Stearns. The 1977, 1976, and 1975 sales are problematic however because in the court's view the time interval between these transactions and the taking is too great for meaningful comparison. In addition, the properties on the higher price end are very dissimilar in terms of the major source of value, namely the coal reserves. In addition, these sales involved the surface and subsurface rights whereas the subject property is solely a mineral estate. Based on these sales, Mr. Lipscomb concluded that the property's value based on comparable sales was $83.25 per acre, a total of $2,250,000. The court feels that this figure is not justified by the facts and that the Stearns property is more valuable in light of its attributes and the prevailing market at the time.

The court concludes from the comparable sales evidence that a strong market for coal-bearing properties existed in the period from 1975-1980. Negotiations for the sale of the subject property were held with numerous parties in the time leading up to the taking, although these discussions never materialized into a final sale. Furthermore, the Ramex lease is evidence that the Stearns property was valuable on the open market. The Ramex lease was executed no later than November 3, 1980 for mining rights on 8,300 acres of Stearns mineral estate. According to Mr. Gable, earned royalties were to be paid at the rate of 8 percent of the selling price, but never less than $2 per ton during the term of the lease. Pl. Ex. 97, Tr. Trans. 297.

The comparable sales previously mentioned support the court's determination that a $5 million award is just. The preponderance of the evidence suggests that the Stearns' property does not have as much coal in reserve as plaintiff has claimed and a lot less than the properties plaintiff cited as comparables. The coal was marketable but was not a consistent, premium grade that would fetch top dollar. A further deduction must be taken for the fact that as Mr. Gable testified, Stearns had not mined the property since 1975. The start-up costs of resuming active mining on the property by a lessee cannot be discounted. In addition, the court notes that Stearns mineral estate is not as valuable as it would have been if it was held in fee. The vast majority of acreage in the comparables offered to the court included surface and subsurface rights. The court finds that any reasonable buyer would offer a lower price for the mineral estate in light of the risk associated with the government's surface ownership.

B. Discounted Cash Flow/Royalty Income Stream

1. Income Capitalization

Another approach to valuing the Stearns' estate is the income capitalization approach. "This approach makes the basic assumption that the property's value is shown by the income realized from it and that the market value can be arrived at by studying the income flow from the property and determining the capital necessary to give this income." B. Gelin & W. Miller, The Federal Law of Eminent Domain, § 4.1 at 200, (1982). Given the fact that it is sometimes difficult to find precisely comparable mineral properties for appraisal, the capitalization of income approach is commonly used. *See Foster v. United States*, 2

Cl. Ct. 426, 448 (1983); *U.S. v. 103.38 Acres of Land*, 660 F.2d 208 (6th Cir. 1981).

a. Coal Production

Using this method, the experts once again reported wide variations. For the government, Mr. Naumann concluded that the fair market value of the property was $3.4 million. For the plaintiff, Mr. Boyd pegged the value at $19.2 million and Mr. Pritchett at $17.2 million. In general, the experts took into account the following considerations: 1) production schedule; 2) coal quality and price; 3) estimated income streams considering administrative costs and associated overhead; and 4) finding the present value by using an appropriate discount rate.

Mr. Naumann and Mr. Boyd both performed comprehensive analyses of the property's income producing potential but came to different conclusions. For instance, Mr. Naumann concluded that it would take seven years to ramp-up to maximum production whereas Mr. Boyd predicted that the property could produce at full capacity within three years. Boyd's projected production schedules were based in part on his opinion, after reviewing relevant market data, that demand for coal was very strong and this fact would accelerate the start-up phase. Boyd reported that national coal production was up 27% from 1975 to 1980, with local production up 56% in the same period. Boyd also mentioned that the number of mines in the region increased from 164 to 240.

The court finds that Mr. Naumann's estimate more closely reflects the actual ramp-up period for a mine of this type, as evidenced by the chart produced by Mr. Naumann showing the classic production models. Def. Ex. 78X. This

chart compares the Boyd projection against estimates made by Mr. Naumann, Mr. Pritchett, and the historical production of the Justus Mine, which was operated by Stearns prior to 1975 and then by Blue Diamond. From looking at the chart it is clear that Mr. Boyd and Mr. Pritchett are overly optimistic and their projections run counter to the classic production models in the industry. Mr. Boyd's claims are further eroded by the fact that this property had not been actively mined since 1975, indicating that resumption of full capacity would take considerable time and effort. In addition, whereas Mr. Boyd projects a constant recovery of 1.2 million tons per year from year 3 into the foreseeable future, the historical mining records of the Stearns Company itself show a great variation from year to year in the actual recovery of coal.

b. Coal Market and Quality

In determining a likely price per ton for the coal, the quality of the coal and market conditions are the key factors. The parties did not agree on the quality of the coal or the appropriate price per ton. Mr. Naumann cited the fact that it was customary in the industry to "higrade" the property, meaning that the best coal is taken out first, and that the Stearns property was no exception. Under this theory, the remaining reserve would have to be of a lesser grade and thus less valuable. Mr. Naumann testified that the remaining coal was marketable but not a premium grade. He said that the coal was medium-to-high sulfur with high-ash content. Mr. Boyd on the other hand testified that the coal was of a premium grade, taking into account ash content, BTU's, and sulfur. Both experts agreed that there was limited historical coal quality data available. Mr. Boyd relied on analytic data available in

various company files, public records, and personal knowledge about the number 3 seam and the Blue Diamond mining operation. Mr. Boyd testified that the BTU rating for Stearns coal would place it in the top 20 percent making its coal highly marketable.

The government makes much of the affect [sic] on coal prices of new source performance standards related to clean air requirements. While Mr. Boyd concedes that the Stearns coal is not low-sulfur, he found that this characteristic had no adverse impact on the market for coal. Based on data from the Federal Energy Regulation Commission, Mr. Boyd reported that 176 million tons of coal with sulfur content in excess of two percent and a composite BTU of 11,355, lower than the BTU rating for Stearns' coal, were sold to steam electric plants in 1980. Tr. Trans. at 1110.

The court finds Mr. Boyd's testimony about the strong market for coal comparable to Stearns' persuasive. Even if Stearns' coal is not uniformly premium, and the evidence clearly shows that it is not, the market for medium-grade coal was strong nonetheless. National coal production was up, local production was up significantly, and there were many more mines operating in the region than in the 5-year period prior to the taking in 1980.

c. Coal Price

Both Mr. Naumann and Mr. Boyd concluded that the Stearns property could be mined profitably. Pl. Br. at 65, Def. Br. at 65. They disagreed however on the price at which Stearns' coal would have sold on the market, with Mr. Naumann settling on $25.28 per ton, Mr. Boyd at $26.80 per ton and Mr. Pritchett at an even $26.00 per ton.

The court has previously confronted this issue in a related case. *See Whitney Benefits v. United States,* 18 Cl. Ct. 394 (1989). In that case, the court called for an inquiry into local market conditions and factors unique to the subject property to determine the appropriate price, in addition to considering industry publications such as Coal Week.[10]

As previously stated, price is affected by many factors, including coal reserve quality, proximity to intended market, and transportation access. Mr. Pritchett's estimate, which falls almost exactly between the other two estimates, was based solely on data from the Statistical Abstract of the United States. While this general reference book is perhaps a good start, reliance on such a generalized reference book is disfavored as it tends to lump all coal into the same category when common sense and the record shows that the price of coal, like any product, varies from region to region, and even within the region.

Although Mr. Boyd's testimony was credible, his search, while more extensive than Mr. Pritchett's, did not go far enough. He relied on data from FERC, Coal Week, and Coal Week data specific to District 8.[11] Mr. Boyd found that the f.o.b. mine coal prices increased from 1975 to 1980. His coal price assumptions include a price of $24.00 for spot coal and $27.50 for contract coal.[12] Based on these

---

[10] Coal Week, a weekly trade publication published by McGraw-Hill, Inc., reports regional "marker" steam coal prices on a bi-weekly basis.

[11] Coal Week District 8 encompasses southern West Virginia, eastern Kentucky, northern Tennessee, and Virginia.

[12] Markets for coal fall into four categories: *utility contract* for long-term contracts with utilities; *utility spot* for utility steam coal on a short-term or spot basis; *industrial-rom* for large scale industrial users;

(Continued on following page)

figures, he projected that Stearns' coal was worth a price of $26.80 per ton.

Mr. Naumann's extensive inquiry into local markets and local sales resulted in specific information that gives the court a more definite picture of the local and regional market. As part of his analysis, Mr. Naumann reviewed market-place transactions involving actual coal shipments to electric utility plants in the years 1978, 1979, and 1980. Def. Ex. 3, Tables 26 and 27. As this court has said, market place transactions are the next best evidence of price as a back stop to price quotations in trade journals. *Whitney Benefits*, 18 Cl. Ct. at 411. The review included coal purchased by electric utilities in Kentucky, Tennessee, Georgia, South Carolina, Indiana, Ohio, Florida, and Alabama. The coal originated in eastern and western Kentucky, Tennessee, West Virginia, Virginia, Pennsylvania, Ohio, Illinois, and Indiana. After sorting all of these transactions by location of purchaser, transportation method, shipment location, and quality, Mr. Naumann came up with a weighted average by state for both medium- and high-sulfur coal. In Kentucky, the weighted average price for high-sulfur coal for the year 1980 was $24.38 per ton, in Ohio it was $27.11, in Indiana it was $23.86. In Kentucky the weighted average for medium-sulfur coal in the year 1980 was $30.81 per ton, in Georgia it was $34.82, in South Carolina it was $39.62 per ton, in Florida it was $48.35 per ton, in Alabama it was $35.93 per ton.

---

and *industrial-sized* for smaller-scaled industrial or institutional customers.

This data supports Mr. Naumann's conclusion that the Stearns coal would receive a price of $25.28 per ton. As previously discussed, it is more likely based on the evidence that the remaining Stearns reserve is largely composed of high-sulfur coal, thus reducing the average price. The court also concurs with Mr. Naumann's use of electric utility purchases as a measure of analysis because the largest single market for the Stearns coal would have been utilities. Based on Mr. Naumann's extensive analysis of completed sales and prevailing market conditions, the court accepts his findings on the issue of price as his approach strikes the court as more reasonable and factually-based than reliance on general reference books and trade journal publications.

d. The Discount Rate

Once again the experts disagreed. Defendant's expert Mr. Naumann applied a discount rate of 21.5 percent in its analysis of the fair market value. As Mr. Naumann notes in his report, the discount rate is a function of several identifiable risk factors. Def. Ex. 3, Page 45-6. Mr. Naumann's discount rate began with the risk-free rate (11.3%), and then added an equity risk premium (1.3%), a risk premium for small size (7.5%), additional coal industry risk (9.5%), resulting in a total risk factor of 29.6% which he discounted to 21.5% after adjusting for inflation. Mr. Naumann attributed the surprisingly high number to inflationary times of the late 1970's and 1980's, the high cost of debt, and the high level of risk associated with this property. Def. Br. at 70.

The Boyd Company discount rate of 11.25% was based on the fact that the rate generally applied in the coal

industry during that period was between 8-12% and on the Bureau of Land Management's Economic Evaluation of Coal Properties guidelines that call for 10% in cases involving operating cash flow. Since royalty income valuation is less risky than operating cash flow, plaintiff asserts that Mr. Boyd's rate is conservative. Pl. Br. at 70. In addition, plaintiff points to Mr. Shober's testimony to confirm that a 10% discount rate was commonly used by land holding companies for valuation purposes. Pl. Br. at 70.

Mr. Naumann's discount rate approach strikes the court as overly cautious. Although coal mining techniques are well-developed, defendant views the activity as inherently risky, not in the sense of worker safety although it can be (as recent events in Pennsylvania demonstrate), but with regard to the risk of exploration, market conditions, and capital costs. Like the airplane, coal mining was once a very risky proposition, but with modern advances and proper procedures, flying airplanes, and coal mining, can be done within acceptable risks. More important, the higher risk Mr. Naumann attributes to the property, true or not, is more properly reflected in the amount a buyer is willing to pay for the parcel. As stated in the BLM appraisal guide, *"In general, the use of a discount rate adjustment to account for risk is not recommended because of the overwhelming subjectivity involved in selecting the risk premium."* BLM Appraisal Guide at 52 (emphasis added).

By comparison, in the *Whitney Benefits* case, the government urged the court to adopt a discount rate of 12.5% for events that took place in 1977, just three years before the taking here. But in the instant case, the defendant urges the court to approve a rate almost double the one advanced in Whitney Benefits. *Whitney Benefits*, 18

Cl. Ct. at 412. The court fails to see how Mr. Naumann's rate is justifiable and adopts the rate advanced by Mr. Boyd.

e. Costs

Both parties factored in the costs associated with such a venture, but to differing degrees. Defendant included contractor fees, mine development costs, Black Lung taxes, Kentucky severance taxes and reclamation costs, administrative costs, sales commissions and fees and lessee's sales and related costs. Def. Br. at 65. Plaintiff deducted 5% for administrative costs that would be incurred by the lessor, which he defined as a way to deduct a fair expense from the gross royalty income that would not go to profit. Tr. Trans. at 1156.

Defendant's analysis is clearly more comprehensive. The question is whether it is customary in the coal industry to take into account such expenses when estimating the fair market value. In *Whitney Benefits,* the court adopted in large part a plan prepared by the Boyd Co. that considered operating and capital costs when establishing fair market value. *Whitney Benefits*, 18 Cl. Ct. at 413. Ironically, in this case the Boyd Co. did not provide the same type of thorough analysis. Nevertheless, the court believes that a potential buyer of property takes into account capital and operating costs associated with buying and selling properties, particularly commercial properties, and thus the court adopts Mr. Naumann's findings in this regard.

All parties agreed that the applicable royalty rate was eight percent.

f. Taxes

The court believes that the fair market value of the property should be established on a pre-tax basis. *See Hughes Aircraft Co. v. United States*, 31 Fed.Cl. 464 (1994), aff'd, 86 F.3d 1566 (1996). In an arms-length transaction the seller's tax obligation remains the same regardless of who buys the property but the buyer's tax status is a question as to corporate form. Valuing property on an after-tax basis wrongly places the burden of the buyer's status on the seller.

g. Interest, Attorneys Fees & Costs

It is well-established that where the government pays just compensation after a taking the owner is entitled to interest on the award. *See Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984). Without this award, the owner would not be placed in the same financial position as if the taking had not occurred. 28 U.S.C. § 2516(a) (1994 & Supp. 2002.); *see also United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951). Thus, Stearns is awarded compound pre-judgment interest from the date of this taking, December 3, 1980, to the date of the judgment. *See United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Miller v. United States*, 223 Cl. Ct. 352, 360, 620 (1980).

As has been the practice of this court, the interest computation shall be based on the Contracts Disputes Act, 41 U.S.C. § 601-613 (1982). *See Jones v. United States*, 3 Cl. Ct. 4, 7 (1983).

V. Damages Summary

When Stearns lost its property right it was clearly damaged, but it has not persuaded the court that its damage award should fall into the $17-20 million range. By the same token, the government has underestimated the value of the Stearns estate. Based on the characteristics of the Stearns property previously discussed, specifically amount and quality of coal in reserve, acreage, and other features of the land, the court believes that what was taken from Stearns had a fair market value of $5 million. Although the fair market value cannot be determined with exactitude, the court believes it has reached an amount that is just and as exact as can be determined in light of all available evidence. Clearly we can never know what a hypothetical purchaser who never existed would have paid for a property not sold over 20 years in the past. However, justice demands the court make its best decision on the preponderance of the evidence, and this the court has done.

In assigning fair market value, the royalty income stream should generally provide a similar result as other valuation methods. Here the court feels that its $5 million dollar award is supported by its royalty income stream analysis. The major income producing factors in a mineral estate are the amount and quality of the coal. Here the Stearns estate could have yielded millions of tons of coal for many years at a profit. Several key elements of the government's analysis were more credible to the court, including its production schedule, coal price analysis, and costs. Plaintiff also convinced the court on several points, including that a viable market for Stearns' coal existed, the amount of the applicable discount rate, and that the

estate should be valued on a pre-tax basis. These findings support the court's damage award.

CONCLUSION

The court thus concludes that the government's action effected a taking of plaintiff's property and that just compensation is warranted under the Fifth Amendment. The court awards plaintiff $5 million in compensation, plus compound interest from December 3, 1980, attorney fees and costs under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U.S.C. § 4601 *et seq.* (1995 & 2002 Supp.)

IT IS SO ORDERED.

LOREN A. SMITH
Senior Judge

THE STEARNS COMPANY, LTD., Plaintiff,
v. UNITED STATES, Defendant.

No. 594-89L

UNITED STATES COURT OF FEDERAL CLAIMS

34 Fed. Cl. 264; 1995 U.S. Claims LEXIS 197

October 20, 1995, Filed

COUNSEL: Bruce F. Clark, Sites [sic] & Harbison, Frankfort, Kentucky, for plaintiff.

Silvia Sepulveda-Hambor, General Litigation Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., for defendant. Mark Hartsoe, Office of the Field Solicitor, Knoxville Field Office, Department of the Interior; John Jasper, Office of the Solicitor, U.S. Department of the Interior; and Jeffrey Einsenberg [sic], Office of General Counsel, U.S. Department of Agriculture, of counsel.

JUDGES: LOREN A. SMITH, CHIEF JUDGE

OPINION BY: LOREN A. SMITH

OPINION:

OPINION

SMITH, Chief Judge.

Plaintiff has asserted a claim for compensation under the Fifth Amendment to the United States Constitution. Its claim is based upon the operation of § 522(e)(2) of the Surface Mining Control and Reclamation Act of 1977 on plaintiff's subsurface mineral rights in land located in the State of Kentucky. This action is before the court on the parties' cross-motions for summary judgment, and

defendant's motions to dismiss and to strike the affidavit of plaintiff's mining engineer. At oral argument, the court granted defense counsel's request to allow the parties to file post-hearing briefs on the effect of several recent opinions on plaintiff's core taking claims: *Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 513 U.S. 1109, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995); *Shelden v. United States,* 7 F.3d 1022 (Fed. Cir. 1993); and *Bowles v. United States,* 31 Fed. Cl. 37 (1994).

The parties cross-motions for summary judgment, and defendant's motions to dismiss and to strike the affidavit of plaintiff's mining engineer hereby are DENIED. A trial must be held in this case to resolve the remaining issues.

FACTS

In 1937, plaintiff Stearns Company (Stearns) divided the surface and mineral estate of some 47,000 acres of coal-rich land in McCreary County, Kentucky by selling the surface estate to the federal government.[1] The surface estate became part of the Daniel Boone National Forest. In the 1937 deed, Stearns reserved an easement to allow access to its mineral estate, subject to certain atypical restrictions.[2] The nature of Stearns' easement through the

[1] Since 1937, Stearns also has sold approximately 14,000 mineral acres, leaving 33,353 acres. Stearns added to its complaint another 2,208 mineral acres under land owned by the United States making the total acreage at stake in its claim 35,561. Stearns has not sought a determination of whether it has "valid existing rights" to mine the final block of 2,208 acres.

[2] The 1937 deed, as excerpted in a 1987 case before the United States Court of Appeals for the Sixth Circuit, states in the relevant part:

(Continued on following page)

federally-owned surface has been the subject of litigation in the Supreme Court of Kentucky and the United States Court of Appeals for the Sixth Circuit.

In 1978, the Supreme Court of Kentucky held that Stearns' right-of-way was not "public property" within the meaning of a Kentucky statute merely because the United States owned the surface estate. *Department of Natural Resources and Envtl. Protection v. Stearns Coal & Lumber Co.*, 563 S.W.2d 471, 472 n.3 (Ky. 1978). In reaching its conclusion, the Supreme Court of Kentucky expressed the view that any effort by the State of Kentucky to deny

---

> There is, also, RESERVED, all metalliferous minerals, coal, oil, gas and limestone in, upon and under the described tracts of land; PROVIDED, however, that all operations from mining and removing same [sic] shall be done and carried on in accordance with the following rules and regulations prescribed by the Secretary of Agriculture, viz:
>
> * * *
>
> (2) In prospecting for, and in mining and removing minerals, oil, or gas, and in manufacturing the products, thereof, *only so much of the surface shall be occupied, used or disturbed as in (sic) reasonable and, according to recognized good practice, necessary for the purpose.*
>
> (3) In underground operations all reasonable and usual provisions shall be made for the *support of the surface,* and to that end the tunnels, shafts; and other workings shall at all reasonable times be open to inspection and examination by the forest officers and mining experts or inspectors of the United States.

United States v. Stearns Coal & Lumber Co., 816 F.2d 279, 281 (6th Cir. 1987) (emphasis added), *cert. denied*, 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987). The Sixth Circuit distinguished the reservation in Stearns' deed from the typical "broad form" deed reservation, common in Kentucky around the time Stearns' deed was executed. The "broad form" reservation allowed the owner of the mineral estate virtually unrestricted access through the surface estate to extract minerals. *Id.* at 281.

Stearns a permit to strip mine premised solely on the fact that the United States held the surface interest would "take[] the property of Stearns without compensation and [violate] both the federal and state constitutions." *Id.* at 473.[3]

Although the foregoing statements by the Kentucky Supreme Court cast doubt on any state effort to limit Stearns' right-to-mine, Stearns, nevertheless, was not exempt from federal regulation. In August 1977, President Carter signed the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328, § 522(e)(2) of which governs mining on "lands within the boundaries of any national forest." 30 U.S.C. § 1272(e)(2). SMCRA establishes a different, and more rigorous, regulatory regime for land "within the boundaries of [a] national forest" than for land outside. *Id.* According to § 522(e)(2), unless a company seeking to mine has valid existing rights, the company must obtain a finding by the Secretary of Interior that the proposal to mine is not "incompatible" with "significant recreational, timber, economic, or other values." *Id.*[4] This requirement is known as a "compatibility determination."

---

[3] In *Stearns*, the Sixth Circuit relied on a detailed analysis of Stearns' reservation in the 1937 deed for the conclusion that the deed did not give Stearns the right to strip mine. *Id.* at 283. The Sixth Circuit, however, did find that the 1937 deed granted Stearns "rights impliedly incident to *underground mining*." *Id.* (quoting *Peabody Coal Co. v. Erwin*, 453 F.2d 398, 399 (6th Cir. 1971)) (emphasis added).

[4] The language of the "compatibility" requirement in § 522(e)(2) appears facially similar to language in other federal statutes that govern the decisions by land management agencies to lease federal land for mining or other purposes. *See, e.g.*, Federal Land Management Policy Act [sic] of 1976 (FLPMA) § 103(c), 43 U.S.C. § 1702(c) (1988) (defining federal agencies' land management obligations in terms of a

(Continued on following page)

Prior to and after the enactment of SMCRA, Stearns attempted to obtain permission from the federal government to extract coal by strip mining, but each time the federal government denied Stearns' permit applications.[5] Finally, in 1980, Stearns entered into a lease with Ramex Mining Corporation (Ramex) to extract coal by underground mining. Ramex planned to disturb 2.62 acres of the surface to reach the coal below. Before Ramex could break ground, however, on December 3, 1980, the Department of Interior, Office of Surface Mining (OSM), informed Ramex in writing that its operation was "on federal lands" within the meaning of SMCRA § 522(e)(2) and that Ramex must seek a valid existing rights determination or a

---

duty to maximize the following values: "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical"). FLPMA requires the Forest Service to prepare a "land use plan" to govern the disposition of National Forest land, § 202(b), and the National Environmental Policy Act (NEPA) requires the Forest Service to prepare an Environmental Impact Statement (EIS) on the proposed plan. *See* NEPA § 102(C), 42 U.S.C. § 4332(C) (1988); *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1404 (9th Cir. 1985). The more extensive NEPA procedures would apply only when seeking a permit to mine property that is entirely federally owned.

[5] Stearns first applied for permission to strip mine from the Secretary of Agriculture (the Forest Service is in the Department of Agriculture) in 1954, but Stearns abandoned its plans when the Secretary denied permission. *United States v. Stearns Coal & Lumber, Co.*, 816 F.2d at 280. In 1976, Stearns again sought permission to strip mine by applying to the Secretary of Agriculture and the Kentucky State Department for Natural Resources and Environmental Protection. *Id.* Although the state agency's initial rejection of Stearns' application to strip mine was overturned by the Supreme Court of Kentucky, the Forest Service's denial – based, in part, on its understanding that the reservation in the 1937 deed did not allow strip mining – was eventually upheld. *Id.* at 283; *Department for Natural Resources and Envtl. Protection*, 563 S.W.2d at 473.

compatibility determination prior to commencing its mining operation.

Stearns and Ramex at this point filed a declaratory judgment action in the United States District Court for the Eastern District of Kentucky seeking a determination that Stearns' pre-existing easement through the surface was not "on federal lands," and, consequently, § 522(e)(2) should not apply. Stearns and Ramex argued that if the court found that Stearns' easement *was* "on federal lands" within the meaning of the statute, then § 522(e)(2) amounted to an unconstitutional taking. The district court denied both claims, and Stearns appealed to the Sixth Circuit. In upholding the lower court's opinion, the Sixth Circuit concluded that the site of the proposed mining operation "fits squarely within the common sense meaning of the phrase 'on federal lands' as used in [SMCRA § 522(e)(2)]." *Ramex Mining Corp. v. Watt,* 753 F.2d 521, 523 (6th Cir. 1985), *cert. denied,* 474 U.S. 900, 106 S. Ct. 271, 88 L. Ed. 2d 225 (1985).

Turning to Stearns' Fifth Amendment taking argument, the Sixth Circuit concluded that *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), controlled. The petitioners in *Hodel* argued that the federal government took its property without compensation merely by enacting SMCRA, and the Supreme Court rejected this claim on ripeness grounds. *Id.* at 297. As the Court observed, "the potential for . . . administrative solutions confirms the conclusion that the taking issue . . . simply is not ripe for judicial resolution." *Id.* Interpreting Stearns' claim as a closely related facial challenge to § 522(e)(2) of SMCRA, the Sixth Circuit concluded in *Stearns:*

> Until an administrative disposition is made of this question [whether Stearns has valid existing rights to engage in underground coal mining], we will not know the nature of the restraint imposed by the government. Thus the District Court correctly ruled that plaintiff's claim was not ripe. . . .

753 F.2d at 524.

On December 19, 1986, OSM determined that Stearns lacked valid existing rights to mine and found that Stearns must seek a compatibility determination before commencing mining. On September 14, 1989, Stearns exhausted its administrative appeals, and on October 31, 1989, Stearns filed in the Claims Court.[6] Stearns has not applied for a compatibility determination.[7] The substance of Stearns' claim is that the requirement to seek a compatibility determination has eviscerated the easement it reserved in the 1937 deed and that this amounts to either a physical invasion or a regulatory taking without just compensation in violation of the Fifth Amendment.

DISCUSSION

I. Defendant's Motion to Strike

A preliminary motion to strike evidence must be addressed before discussing the dispositive motions. As

---

[6] The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506 (1992), changed the name of the United States Claims Court to the United States Court of Federal Claims.

[7] Ramex, at one point, did request a compatibility determination to allow it to mine Stearns' land under its lease, but Ramex has withdrawn its request.

evidence that a taking occurred, Stearns has presented the affidavit of a mining engineer named Aubrey J. Cornette. In his affidavit, Mr. Cornette interprets significant and contested legal terms, such as "valid existing rights" and "compatibility."

Defendant has moved to strike this affidavit under RCFC 12(f) on the grounds that it contains "conclusions of law." RCFC 12(f) provides in relevant part: "Upon motion . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." In *Principal Mutual Life Ins. Co. v. United States,* 26 Cl. Ct. 616, 623 (1992), *aff'd,* 50 F.3d 1021 (Fed. Cir. 1995), this court struck an affidavit that dealt "with legal issues which fall within the unique purview of the court." The court found that the bulk of the affidavit at issue in *Principal Mutual* involved interpretation of legal terms and thus could not be considered helpful, admissible expert testimony. *Id.* at 625 (citation omitted). Expert testimony that reaches legal conclusions may be admissible only "in exceptional circumstances, ***i.e.***, where the testimony concerns 'state law or a technical provision peculiar to the . . . industry.'" *Id.* (quoting *Aetna Life Ins. Co. v. United States,* 16 Cl. Ct. 364, 375 (1989), *aff'd,* 935 F.2d 280 (Fed. Cir. 1991)).

Plaintiff contends that Mr. Cornette's affidavit merely provides *support* for conclusions of law. Experts may refer to existing law, *see, e.g., Specht v. Jensen,* 853 F.2d 805, 809 (10th Cir. 1988), *cert. denied,* 488 U.S. 1008, 109 S. Ct. 792, 102 L. Ed. 2d 783 (1989), and conclusory terms that touch on legal concepts which may be employed in technical areas, such as patent law, if such testimony assists the court. *See, e.g., Snellman v. Ricoh Co.,* 862 F.2d 283, 287

(Fed. Cir. 1988) (noting that "expert testimony is admissible to explain the meaning of technical terms in the claims and to give an opinion on the ultimate question of infringement."), *cert. denied,* 491 U.S. 910, 109 S. Ct. 3199, 105 L. Ed. 2d 707 (1989). In the takings area, experts properly may testify about the effect on the value of the property if its use is limited by a governmental action. *See, e.g., Bowles,* 31 Fed. Cl. 37 (1994). Ultimately, however, the court must apply the law and make a determination on its particular effect on the property.

Mr. Cornette states in the affidavit that in his opinion, "the 'compatibility' provisions of § 522(e)(2) vest in the United States the right to determine whether Stearns, or a prospective purchaser of The Stearns Properties, will be allowed to mine the coal. This power in the hands of the surface owner renders worthless the coal rights of the mineral owner." Mr. Cornette concludes that "Stearns no longer has the valid right to mine, lease or sell its deep mining rights" and that the Secretary of Interior would not find mining compatible under SMCRA. Mr. Cornette testifies about the legal significance of SMCRA and how it affects Stearns' mineral rights, and predicts how the Department of Interior will apply the statutory scheme to the land in question in the future. The court finds much of Mr. Cornette's affidavit troubling because his interpretations of legal terms sometimes go beyond assisting as an incidental aid to help the court understand a technical area of law. Nevertheless, the court recognizes that the issue before the court involves mixed questions of law and fact or questions of fact based upon contested legal terms. Therefore, this court denies defendant's motion to strike the affidavit, and instead the court discounts Mr. Cornette's purely legal conclusions in its analysis of the affidavit.

II. Motion to Dismiss

A. Ripeness

The government has moved to dismiss on the grounds that this dispute is not ripe for adjudication. The government argues that this dispute is not ripe until Stearns actually utilizes the compatibility determination process. According to the government, this court cannot properly decide whether a taking has occurred until the government has determined that mining is incompatible and thus completely prohibited.

Stearns claims that SMCRA effectively has caused a regulatory taking in the instant case by denying priority to Stearns' superior mineral estate. Stearns contends that OSM's denial of Stearns' claim that it possesses valid existing rights to mine, despite the reservation in the 1937 deed, together with OSM's insistence that Stearns obtain a compatibility determination has effected a compensable taking of Stearns' property. Stearns argues that the requirement to seek a compatibility determination is itself a compensable taking. If the compatibility determination process is a reasonable variance type procedure, then it may be premature to find a compensable taking if one has not sought a compatibility determination. The government's argument assumes, however, that requiring a compatibility determination is a reasonable variance type procedure, which is the precise issue Stearns is arguing before this court.

The ripeness doctrine provides that only disputes involving an actual, present controversy are proper for adjudication in federal courts. In the administrative context, the ripeness doctrine requires that the relevant administrative agency reach a decision that actually

affects the plaintiff before a court will adjudicate a challenge to the agency's action. *See Abbott Labs. v. Gardner,* 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1968). In *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), the Supreme Court held that a regulatory takings claim was premature when a developer failed to either seek variances or utilize the state's compensation procedure. The Court stressed that plaintiffs must receive the regulatory agency's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *See also, Loveladies Harbor, Inc. v. United States,* 15 Cl. Ct. 381, 386-387 (1988) (summary judgment denied); *Loveladies Harbor, Inc. v. United States,* 21 Cl. Ct. 153 (1990), *aff'd,* 28 F.3d 1171 (Fed. Cir. 1994) (addressing variance procedures in a federal taking claim). To be considered ripe, Stearns must have obtained a final agency decision on how it will apply the regulations to Stearns' mineral estate and have utilized all reasonable variance type procedures. Only a showing that such a procedure would be futile generally would allow the court to disregard this requirement.

The Secretary of Interior has determined that Stearns' mineral estate is on federal lands, and that SMCRA applies so that Stearns cannot mine unless Stearns has valid existing rights or obtains a compatibility determination. Stearns has not sought a compatibility determination, but has sought and been denied valid existing rights. Finding that one possesses valid existing rights is the only available variance type procedure that excuses one from the burden of obtaining a compatibility determination. Stearns has been denied valid existing rights and has exhausted all of its appeals on this issue and whether

SMCRA applies to its mineral estate. Thus, Stearns has obtained a final, definitive position from the Department of Interior that it must seek a compatibility determination before it can mine. This court, therefore, concludes that Stearns' claim that the requirement to obtain a compatibility determination itself constitutes a taking is ripe because the Department of Interior's position on this issue is final. Stearns cannot pursue further administrative action.

B. Standing

The government argues that the court must dismiss plaintiff's claims because plaintiff did not own the property at issue when it was allegedly taken and thus lacks standing. On December 3, 1980 through 1988, title to the property at issue was held by The Stearns Coal and Lumber Company, a Michigan corporation. Title now is held by the plaintiff, The Stearns Company, Ltd., a partnership formed under the laws of Kentucky.

Transfers or assignments of claims against the government, including taking claims, are subject to and barred by the Anti-Assignment Act, 31 U.S.C. § 3727 (1982), unless the transfer falls within one of the recognized exceptions to the Act. This Act has three main purposes:

> first, to prevent persons of influence from buying up claims which might then be improperly urged upon Government officials; second, to prevent possible multiple payment of claims and avoid the necessity of investigation of alleged assignments by permitting the Government to deal only with the original claimant; and third, to preserve for the Government defenses and counterclaims

> which might not be available against an assignee.

Kingsbury v. United States, 215 Ct. Cl. 136, 563 F.2d 1019, 1024 (Ct. Cl. 1977) (citations omitted).

Courts have found that a transfer merely was incidental to a corporate change when little or no change in the equitable ownership of the corporation has occurred. For example, in *Kingan & Co. v. U.S.,* 71 Ct. Cl. 19, 44 F.2d 447 (Ct. Cl. 1930), the Court of Claims found that the transfer of a claim from a British corporation to a domestic one did not change the beneficial ownership because:

> In substance therefore there was really no transfer of the subject-matter of the claim in question, for, although the bare legal title to the claim might have passed from Kingan & Co., Limited, to the plaintiff under the deeds referred to in the facts, the equitable ownership of the claim at all times reposed in the same individuals, that is, in the hands of the same stockholders.

Kingan & Co., 44 F.2d at 451.

One major exception to the Act is any transfer that is incidental to a corporate merger, consolidation, or reorganization in which "there is no probability that the United States could suffer injury in respect of outstanding claims." *Seaboard Air Line Ry. v. United States,* 256 U.S. 655, 657, 41 S. Ct. 611, 612, 65 L. Ed. 1149 (1921). In a case arising under the anti-assignment statute, 41 U.S.C. § 15, which prohibits the transfer of government contracts, the dissolution of a corporation and consequent formation of a partnership was found to be "a change in business structure" and not within the purview of either anti-assignment

statute. *See, e.g. Thompson v. Commissioner,* 205 F.2d 73 (3d Cir. 1953).

In the instant case, although bare legal title to the mineral estate has passed from the Michigan corporation to the Kentucky partnership, the equitable ownership of the taking claim at all times remained in the same individuals in the same proportion after the company reorganized as a partnership. Plaintiff's change from corporation to partnership was merely a reorganization in business structure, which falls under an exception to the Anti-Assignment Act.

The government's arguments that this assignment is improper because twelve subsidiaries and various partnership interests were liquidated in the reorganization is unconvincing because the percentage of the overall equity interests in the claim remained the same. The government's argument that Stearns Ltd. received from the Stearns Partnership not just this claim for just compensation, but instead a guaranteed title to the mineral interests at issue is more complex. Defendant has alleged that Stearns reorganized merely to continue this suit. However, no evidence exists to support this allegation. Plaintiff alleges that it reorganized primarily for tax purposes, and the government introduced no evidence to the contrary.

Although plaintiff, the partnership, is not identical to its predecessor Stearns, the corporation, the transfer of this claim does not violate the Anti-Assignment Act because equitable ownership remained the same. Furthermore, no evidence exists that Stearns reorganized just to transfer this claim.

III. Taking Claims

The Fifth Amendment provides, in part: "nor shall private property be taken for public use without just compensation." The right to compensation secured by the Fifth Amendment is among the principal foundations of American liberty, and it is no less fundamental than the rights secured by the First Amendment or the other amendments of the Bill of Rights. *See Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309, 2320, 129 L. Ed. 2d 304 (1994). The purpose of the compensation guarantee is to prevent the government from requiring a few to bear burdens that, in fairness, should be borne by the public as a whole. *Armstrong v. United States,* 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960).

The Supreme Court has interpreted the Fifth Amendment to require compensation when the government physically and permanently invades private property in any manner, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), and when the regulation of private property "goes too far." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). No doubt exists that this formulation has caused the courts serious problems. "Goes too far" hardly creates a bright line test, or perhaps even a test at all. *See,* James L. Huffman, *Lucas: A Small Step in the Right Direction,* 23 Entl. L. 901 (1993) ("Goes 'too far' . . . provides no guidance whatsoever.") It has been criticized as replacing a rule of law with the subjective rule of judges. While subsequent caselaw has given some slight improvement in this area of jurisprudence, the law of taking claims hardly can be considered clear or coherent. *See, e.g., Bowles v. United States,* 31 Fed. Cl. 37 (1994). This court, however, cannot turn this judicial straw into a

golden or even predictable rule. Apparently, only the political branches can create a steadfast rule. The courts, however, must as a mechanism of last resort decide cases where this less than helpful rule applies, to the consternation of judges, property owners and the government.

Physical takings occur when the government occupies privately owned land for its own purposes. *See, e.g., Hall v. City of Santa Barbara,* 797 F.2d 1493 (9th Cir. 1986), *cert. denied,* 485 U.S. 940, 108 S. Ct. 1120, 99 L. Ed. 2d 281 (1988). "Courts have held that even relatively minor physical occupations are compensable." *Florida Rock,* 18 F.3d at 1569 (citing *Loretto,* 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 and *Hendler v. United States,* 952 F.2d 1364 (Fed. Cir. 1991)).

Courts have recognized that the physical occupation category includes situations in which the government effectively takes title, possession, or denies owners use of their land. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (finding a navigational servitude imposed on a private marina to be compensable); *Shelden v. United States,* 7 F.3d 1022 (Fed. Cir. 1993) (finding that a valid mortgage was appropriated when the underlying property was forfeited to the United States).

Courts have held that the government may appropriate property through regulation as well as through condemnation or physical invasion. In *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), the Supreme Court announced three factors for determining, whether a regulation "goes too far" and amounts to a taking: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the

regulation has interfered with distinct investment-backed expectations," and (3) "the character of the government action." *Id.* at 124. Nevertheless, in listing the foregoing factors, the Court recognized that there could be no "set formula" for determining when the Fifth Amendment required compensation. *Id.* The answer to the question of whether compensation is due depends on the outcome of "essentially ad hoc, factual inquiries" in individual cases. *Id.* While this often places a severe burden on public and private litigants alike, no method currently exists to avoid this burden under the current status of taking jurisprudence.

The question of whether Stearns' claim can be characterized as a physical or regulatory taking is, in many ways, one of the most difficult issues in this case. Stearns argues that the Department of Interior physically invaded Stearn's property when, on December 3, 1980, OSM sent Stearns a letter informing Stearns of its statutory duty to obtain a determination on "valid existing rights" or compatibility under § 522(e)(2). Stearns alleges that these actions by the United States physically occupied its mineral estate in their effect. Stearns argues that, like the landowners in *Loretto,* who were forced to grant Teleprompter Manhattan an easement, the government extinguished Stearns' easement to disturb the surface when using the deep mining method. A fundamental premise to this argument is that, under Kentucky law, a mineral estate dominates over the surface estate. *See Akers v. Baldwin,* 736 S.W.2d 294 (Ky. 1987). Stearns contends that after the OSM determined that Stearns did not have valid existing rights, the surface estate became dominant over its mineral estate because the owner of the surface, the United States, could now veto any proposed

mining by finding that it was incompatible. Separately, Stearns argues that the government has taken Stearns property by regulation. Stearns contends that SMCRA's federal lands provisions go too far because they further the government's own property interest as the owner of the surface estate by effectively prohibiting mining and thus extinguishing Stearns' mineral estate.

This court recognizes that the nature of the compatibility determination process is central to resolving plaintiff's taking claim. If the process is a futile one, or so burdensome that it effectively deprives the property of value, then this court is inclined to find that a compensable taking occurred. The characterization, however, of the government's action as either a physical or a regulatory taking may be important to the resolution of this case. Different methods of analysis apply to determine whether a taking has occurred based upon a physical invasion, *see Loretto,* 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, or a regulation, *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). In applying the principles developed in both physical and regulatory taking jurisprudence, the court is convinced that Stearns' taking arguments only can be resolved at trial.

Since a trial must be held on this issue it makes no sense to resolve in the currently abstract context the question of whether this is a physical or a regulatory taking claim. On the basis of the record seen so far it appears close to the conceptual border. This type of question is better resolved in a trial then on motions for summary judgment.

IV. SUMMARY JUDGMENT

Pursuant to RCFC 56(c) both parties seek summary judgment on this issue. Summary judgment is proper only when no genuine issue as to any material fact exists. Material facts are those which will make a difference in the result of the case. *See Curtis v. United States,* 168 F. Supp. 213, 216, 144 Ct. Cl. 194 (1958), *cert. denied,* 361 U.S. 843, 80 S. Ct. 94, 4 L. Ed. 2d 81 (1959). *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Courts have been reluctant to grant summary judgement on taking claims because the question of whether a taking has occurred is usually fact-intensive. *See, e.g., Yuba Goldfields, Inc. v. United States,* 723 F.2d 884, 887 (Fed. Cir. 1983); *Brown v. United States,* 30 Fed. Cl. 23, 25 (1993). "The fact that there are cross-motions for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other." *Brown,* 30 Fed. Cl. at 26.

Stearns argues that the compatibility determination is futile because the Secretary of Interior has discretion over whether to find the mining compatible. Plaintiff's geological engineer, Mr. Aubrey Cornette, states in his affidavit that compatibility is not likely to be found by the Secretary for all of Stearns property, and especially the 15,200 acres that fall within an area designated as environmentally sensitive "Wild Rivers." Stearns argues that the compatibility determination process is unduly burdensome because it must be performed separately for each mine.

The government responds that the compatibility process is not futile because the standards supplied in

SMCRA limit the Secretary's discretion. As evidence that the process is not futile nor unduly burdensome the government alleges that, in the same national forest where Stearns' property is located, 17 of 17 compatibility determinations requested and not withdrawn before a final decision, have been granted. The government also suggests that the compatibility determination process is not unduly burdensome because all mines need permits before commencing operations.

The government suggests that all compatibility determinations in this area are favorable, while plaintiffs contend that many potential applicants never apply or withdraw their applications if they are not likely to be granted. The plaintiff argues that the mine specific nature of compatibility determinations prevents plaintiff from realizing the fair market value in a sale of its property. The government responds that Stearns could lease and sell with a warrantee.

The court reiterates the importance of the factual context to its taking analysis. While the court recognizes that the dispute over the nature of compatibility determinations involves legal issues, this dispute is a mixed question of law and fact. The factual aspects of this issue are material because the nature of the compatibility determination process is fundamental to determining whether a compensable taking has occurred here. Since material facts are in dispute, the court cannot grant summary judgment to either side. To efficiently resolve this dispute, the court will hold a limited evidentiary hearing on this central issue.

CONCLUSION

As indicated in this opinion, the parties cross-motion for summary judgment, and defendant's motions to dismiss and to strike the affidavit of plaintiff's mining engineer are hereby DENIED.

The parties shall file a status report within 60 days of issuance of this opinion setting forth a discovery period and schedule for a limited evidentiary hearing.

IT IS SO ORDERED.

LOREN A. SMITH

CHIEF JUDGE

In the United States Court of Federal Claims

Case No. 594-89 L
(Filed: August 26, 2003)

* * * * * * * * * * *		
THE STEARNS COMPANY, LTD.	*	
Plaintiff,	*	Motion on
	*	Reconsideration;
v.	*	comparable sales.
THE UNITED STATES	*	
Defendant.	*	
* * * * * * * * * * *		

Bruce Clark with *Judith Villines* and *Michelle Whittington*, all of Frankfort, Kentucky, for plaintiff.

Silvia Sepulveda-Hambor, General Litigation Section, Environmental and Natural Resources Division, U.S. Department of Justice, Washington, D.C., for defendant. *Daniel W. Kilduff*, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., was of counsel.

ORDER

Senior Judge Smith.

In *Stearns Co., Ltd. v. United States*, 53 Fed. Cl. 446 (2002), the Court awarded $5 million in just compensation to the Stearns Co., Ltd. ("Stearns") for the taking of Stearns' subsurface coal mining rights under the Daniel Boone National Forest pursuant to the taking clause of the Fifth Amendment. The Court based this decision on what might be termed a "gestalt" approach to damages. The gestalt approach entailed examining evidence based on a variety of damages theories, including comparable sales

analysis and royalty income analysis, and reaching "an amount that is just and as exact as can be determined in light of all available evidence." *Stearns*, 53 Fed. Cl. at 466. The Court therefore did not emphasize a specific damages theory in calculating Stearns' award. *See id.* at 446. We concluded that the comparable sales evidence offered by the parties "support the court's determination that a $5 million award is just." *Id.* at 462. We also held that the award "was supported by [our] royalty income stream analysis." *Id.* at 466.

Stearns filed a timely motion for reconsideration of the Court's decision pursuant to Rules of the Court of Federal Claims 59(a)(1). Stearns presented compelling evidence showing that royalty income stream analysis incorporating our findings at trial produced a damages valuation of $10,057,000 for the taking of Stearns' property (the "Property"). Stearns further argued that the only comparable sales evidence suitable for analysis that we examined in *Stearns* was not actually comparable to the Property. *Id.* at 446. After careful consideration of the parties' briefs regarding Stearns' motion, and holding oral argument, the Court hereby GRANTS Stearns' motion for reconsideration.

It is well established that comparable sales have "probative value only if the subject and comparison properties have similar characteristics." *Snowbank Enterprises, Inc. v. United States*, 6 Cl. Ct. 476, 485 (1984). In *Stearns*, we held that the Property should be valued on a price-per-ton basis. 53 Fed. Cl. at 456. The only land sale that we viewed in *Stearns* as comparable to the Property for which there was sufficient data in the record to perform a price-per-ton analysis was the sale of land from

Tennessee Land and Mining Co. to Koppers, Inc. (the "Koppers" sale). *See* 53 Fed. Cl. at 461.

However, in *Stearns*, the Court specifically rejected considering the sale of two other tracts of land for the purpose of comparable sales analysis because each tract contained far more coal than was at issue on the Property. *See* 53 Fed. Cl. at 461. One tract contained 130 million tons of coal, and the other tract contained 47 million tons of coal. *Id.* The Koppers sale involved 70 million tons of coal. *See id.* The amount of coal involved in the Koppers sale therefore lay within a range of values that we considered invalid for the purpose of conducting comparable sales analysis with respect to the Property. Thus, our decision erred by permitting the use of the Koppers sale for comparable sales analysis. *Id.* In light of the absence of probative comparable sales data, the gestalt method that we used in our decision was not as reliable as the income analysis offered by Stearns' motion, which resulted in relatively hard evidentiary conclusions.

For the above reasons, the Court hereby GRANTS Stearns' motion for reconsideration, and awards Stearns $10,057,000 for the Property's taking, plus compound interest on the award from December 3, 1980, and attorneys' fees and costs under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U.S.C. § 4601 *et seq.* (2002). The Clerk of the Court is instructed to enter judgment in accordance with this order.

IT IS SO ORDERED.

LOREN A. SMITH
SENIOR JUDGE

STEARNS CO. ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL.; and GABRIEL ENERGY CORP. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL.

No. 84-1877; No. 84-1938.

SUPREME COURT OF THE UNITED STATES

474 U.S. 900; 106 S. Ct. 271; 88 L. Ed. 2d 225; 1985 U.S. LEXIS 3936; 54 U.S.L.W. 3252; 23 ERC (BNA) 1520

October 15, 1985

OPINION:

Certiorari denied.

RAMEX MINING CORPORATION (83-5299), GABRIEL ENERGY CORPORATION (83-5305), Plaintiffs-Appellants, and THE STEARNS COMPANY (83-5299), Intervening Plaintiff-Appellant, v. JAMES WATT, SECRETARY OF INTERIOR; PAUL REEVES, ACTING DIRECTOR; ANDREW BAILEY, ACTING DIRECTOR, OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT; DAVID C. SHORT, REGION II, OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT, Defendants-Appellees

Nos. 83-5299, 83-5305

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

753 F.2d 521; 1985 U.S. App. LEXIS 14680; 22 ERC (BNA) 1420; 15 ELR 20214

October 3, 1984, Argued
January 29, 1985, Decided

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

COUNSEL:

Ben B. Fowler (Lead) argued, William H. Gorin, Stites & Harbison, Frankfort, Kentucky, Bruce F. Clark, for Appellants.

Louis DeFalaise, United States Attorney, Lexington, Kentucky, Jane E. Graham (Lead) argued, for Appellees.

JUDGES:

Stewart, Associate Justice (Retired);* Engel and Merritt, Circuit Judges.

OPINION BY:

MERRITT

OPINION:

MERRITT, Circuit Judge.

In each of these two cases against the Secretary of the Interior, a coal mining company proposes to mine coal under the surface of land owned and maintained by the federal government as forest land. The mining company claims a valid royalty lease of the mineral estate from the successor in interest of the original owner who reserved the mineral estate when he sold the fee interest in the land to the government. Each case arises under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1983). In each, the coal mining company and the owners of the underlying royalty mineral interest seek from this Court a declaratory judgment that they are entitled to mine coal under the federal lands. In one case the coal underlies part of the Daniel Boone National Forest in Eastern Kentucky, and in the other case the land is part of the so-called "Redbird Purchase

* The Honorable Potter Stewart, Associate Justice (Retired) of the United States Supreme Court, sitting by designation.

Unit" near the Daniel Boone National Forest. Plaintiffs do not seek injunctive relief or damages.[1]

The 1977 Act applies to mining on both public and private lands, but the questions of interpretation and application of the Act presented by plaintiffs here relate to one of the provisions applicable only to public lands, namely § 522(e)(2), codified as 30 U.S.C. § 1272(e)(2). That section provides, with certain exceptions which we need not enumerate here, that "subject to valid existing rights," no coal mining which disturbs the surface "shall be permitted . . . on any federal lands within the boundaries of any national forest. . . ."[2]

---

[1] Plaintiffs originally sought an injunction prohibiting the Secretary from interfering with their mining operations, but have not pursued this remedy. Similarly, although plaintiffs have made a Fifth Amendment takings argument, they have not sought damages at this juncture.

[2] Section 1272(e) reads as follows:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which exist on August 3, 1977, shall be permitted –
>
> (1) On any lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System . . . ;
>
> (2) On any federal lands within the boundaries of any national forest: *provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface mining operations and –
>
> (A) Surface operations and impacts are incidental to an underground coal mine;
>
> . . . .

Plaintiffs request a declaratory judgment holding that section 1272(e)(2) is not applicable to the mines they intend to operate and hence that the Office of Surface Mining which administers the Act may not apply and enforce this section against them. They argue that section 1272(e)(2) does not regulate their proposed mines for the following reasons: (1) section 1272(e)(2) does not cover separate mineral interests owned by private parties under federal forests but covers only surface interests; (2) unless the section is read to exclude such private mineral estates, the section constitutes an unconstitutional taking under the Fifth Amendment; (3) the mineral estate underlying the government-owned "Redbird Purchase Unit" is not covered by section 1272(e)(2) because Redbird is not a national forest.

When the Office of Surface Mining learned that the two mining companies were about to conduct underground mining operations which would disturb the surface of federal lands, the administrator gave notice that the companies are required to seek and obtain permits under the Surface Mining Reclamation Act and would be subject to the provisions of section 1272(e)(2). When plaintiffs received these notices, they filed this action for declaratory judgment in District Court rather than participate in the administrative hearing process established by the Act. The Act prohibits the mining of coal without an administrative permit, 30 U.S.C. § 1256, and provides for administrative review and adjudication of disputes arising from permit applications. 30 U.S.C. § 1264.

The District Court overruled in part the government's motion to dismiss the complaints on grounds that plaintiffs had not exhausted their administrative remedies and that their cases were not ripe for decision. Instead, the

Court rendered a partial declaratory judgment construing and applying the statute. It held that the companies' mineral interests and mining operations would operate under and on federal forest lands, and were therefore governed by section 1272(e)(2) of the Act. The District Court then agreed with the government's position regarding ripeness, and ruled that it would defer to the agency's primary jurisdiction regarding plaintiffs' further claims. However, upon motion filed by the plaintiffs, the District Court dismissed the cases in their entirety so that plaintiffs could appeal from the declaratory judgment. On appeal, the government has formally waived any exhaustion and ripeness contentions to the extent that they might be interpreted to interfere with the District Court's limited declaration, and asserts that the judgment is now ripe for decision by this Court.

Plaintiffs' first argument is that the Act, and specifically section 1272(e), does not apply to them at all, because their proposed mining operations will not occur "on federal lands." Their theory is that they still own the "lands" beneath the surface, and although the federal government has been granted some rights on the surface, the lands affected by plaintiffs' mining, including the surface land necessarily disturbed by their underground mines, are wholly owned by the private plaintiffs as a matter of state law. Proceeding from this premise, plaintiffs then claim that they cannot be made to resort to the administrative procedure that the Office of Surface Mining has set up for determination of "valid existing rights," because that process necessarily assumes that the plaintiffs' operations will occur "on federal lands."

Plaintiffs' proposal to mine beneath federal national forest lands, with the conceded attendant effects on the

surface of those lands, fits squarely within the common sense meaning of the phrase "on federal lands" as used in section 1272(e)(2). This is even more apparent when the definition of "surface mining" contained in the Act, *i.e.*, "surface impacts incident to an underground mine," is substituted for the phrase "surface mining" in section 1272(e). Thus, the Act and section 1272(e) apply to plaintiffs' mines. The District Court was correct in so holding.

The plaintiffs' "taking" argument is governed by the Supreme Court's decision in *Hodel v. Virginia Surface Mining and Reclamation,* 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981), a pre-enforcement challenge to the Surface Mining Act. The Court held that the Act is not facially invalid. Its "mere enactment" does not constitute a taking of plaintiffs' mineral estate. Thus, the Court upheld the Act against the same type of attack under the Fifth Amendment as plaintiffs make in the instant case.

The Supreme Court observed that "the Act does not, on its face, prevent beneficial use of coal-bearing lands," and the coal companies "cannot at this juncture legitimately raise complaints in this Court about the manner in which the challenged provisions of the Act have been or will be applied in specific circumstances" because "there is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative review." 452 U.S. 296-97. The Court explains the hypothetical nature of the "taking" claims before it – "if appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached" – and concludes that "the potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." *Id.* at 297 (footnote

omitted). The same reasoning applies in this case. The Office of Surface Mining has not yet ruled on the questions of plaintiffs' "valid existing right" to engage in underground coal mining under section 1272(e)(2). Until an administrative disposition is made of this question, we will not know the nature of the restraint imposed by the government on plaintiffs' mining operations. Thus the District Court correctly ruled that plaintiffs' takings claim was not ripe for adjudication, and deferred to the agency's jurisdiction.

We agree with the District Court that lands within the Redbird Purchase Unit are "national forest" lands within the meaning of section 1272(e)(2). "National forest" land, primarily in the west, has been set aside for many years by the President from land in the public domain under section 24 of the Creative Act of 1891, 16 U.S.C. § 471. *See United States v. New Mexico,* 438 U.S. 696, 705, 57 L. Ed. 2d 1052, 98 S. Ct. 3012 (1978). "National forest" land within the meaning of section 1272(e) has also been acquired, primarily in the eastern section of the United States, under section 11 of the Weeks Law of 1911, 16 U.S.C. § 521, which provides that land so acquired "shall be permanently reserved, held and administered as national forest land" just as are the western lands set aside by the President under the Creative Act of 1891. Land acquired as forest land under the Weeks Act, as distinguished from land set aside under the Creative Act of 1891, need not be formally set aside and proclaimed as national forest by the President. The acquisition of the land by the United States under the authority of the Weeks Act is sufficient to designate it as "national forest."

The "Redbird" Forest in question here is a so-called "purchase unit" acquired, held and administered as

"national forest" land under the Weeks Act. The District Court was therefore correct in holding that section 1272(e) regulating coal mining in national forests governs lands within the Redbird Purchase Unit.

Accordingly, the judgment of the District Court is affirmed. Further relief not inconsistent with this opinion must be sought as an initial matter from the Secretary.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-5031

THE STEARNS COMPANY, LTD.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

ORDER

(Filed Apr. 25, 2005)

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE,* and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

---

* An amici curiae brief was filed by the Blue Grass Institute for Public Policy Solutions, et al.

The mandate of the court will issue on May 2, 2005.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: April 25, 2005

cc: Katherine J. Barton
Bruce F. Clark
John D. Echeverria, Timothy J. Dowling
Nancy G. Marzulla

THE STEARNS COMPANY V US, 04-5031
(CFC – 89-CV-594)

* *

* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *

* *

30 U.S.C.S. § 1272. Designating areas unsuitable for surface coal mining

(a) Establishment of State planning process; standards; State process requirements; integration with present and future land use planning and regulation processes; savings provision.

(1) To be eligible to assume primary regulatory authority pursuant to section 503 [30 USCS § 1253], each State shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in paragraphs (2) and (3) of this subsection but such designation shall not prevent the mineral exploration pursuant to the Act [30 USCS §§ 1201 et seq.] of any area so designated.

(2) Upon petition pursuant to subsection (c) of this section, the State regulatory authority shall designate an area as unsuitable for all or certain types of surface coal mining operations if the State regulatory authority determines that reclamation pursuant to the requirements of this Act [30 USCS §§ 1201 et seq.] is not technologically and economically feasible.

(3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will –

(A) be incompatible with existing State or local land use plans or programs; or

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or

(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(4) To comply with this section, a State must demonstrate it has developed or is developing a process which includes –

(A) a State agency responsible for surface coal mining lands review;

(B) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations;

(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and

(D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.

(5) Determinations of the unsuitability of land for surface coal mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels.

(6) The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on the date of enactment of this Act [enacted Aug. 3, 1977] or under a permit issued pursuant to this Act [30 USCS §§ 1201 et seq.], or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

(b) Review of Federal lands. The Secretary shall conduct a review of the Federal lands to determine, pursuant to the standards set forth in paragraphs (2) and (3) of subsection (a) of this section, whether there are areas on Federal lands which are unsuitable for all or certain types of surface coal mining operations: *Provided, however,* That the Secretary may permit surface coal mining on Federal lands prior to the completion of this review. When the Secretary determines an area on Federal lands to be unsuitable for all or certain types of surface coal mining operations, he shall withdraw such area or condition any mineral leasing or mineral entries in a manner so as to limit surface coal mining operations on such area. Where a Federal program has been implemented in a State pursuant to section 504 [30 USCS § 1254] the Secretary shall implement a process for designation of areas unsuitable for surface coal mining for non-Federal lands within such State and such process shall incorporate the standards and procedures of this section. Prior to designating Federal lands unsuitable for such mining, the Secretary shall consult with the appropriate State and local agencies.

(c) Petition; notice intervention; decision. Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten months after receipt of the petition the regulatory authority shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time, and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this subsection, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty days after such hearing, the regulatory authority shall issue and furnish to the petitioner and any other party to the hearing, a written decision regarding the petition, and the reasons therefore [therefor]. In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

(d) Statement. Prior to designating any land areas as unsuitable for surface coal mining operations, the regulatory authority shall prepare a detailed statement on (i) the potential coal resources of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal.

(e) Prohibition on certain Federal public and private surface coal mining operations. After the enactment of this Act [enacted Aug. 3, 1977] and subject to valid existing rights no surface coal mining operations except those

which exist on the date of enactment of this Act [enacted Aug. 3, 1977] shall be permitted –

(1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act [16 USCS § 1276(a)] and National Recreation Areas designated by Act of Congress;

(2) on any Federal lands within the boundaries of any national forest: *Provided, however*, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and –

(A) surface operations and impacts are incident to an underground coal mine; or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960 [16 USCS §§ 528 et seq.], the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further*, That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory

authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

STEARNS COMPANY, LTD.,	)	
Plaintiff,	)	
v.	)	No. 594-89L
THE UNITED STATES,	)	
Defendant.	)	

Courtroom 4, Room 501
National Courts Building
717 Madison Place, N.W.
Washington, D.C.

Thursday,
July 16, 1998

The parties met, pursuant to the notice of the Judge, at 10:47 a.m.

BEFORE: HON. LOREN A. SMITH Chief Judge

APPEARANCES:

For the Plaintiff:

BRUCE F. CLARK, ESQ.
JUDITH A. VILLINES, ESQ.
PEGGY TIPTON, Paralegal
EMILY M. IMHOFF, Paralegal
Stites & Harbison
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
(202) 223-3477

Also for the Plaintiff:

MICHELE M. WHITTINGTON, ESQ.
Stites & Harbison
250 West Main Street
2300 Lexington Financial Center
Lexington, Kentucky 40507
(606) 226-2300

For the Defendant:

SILVIA SEPULVEDA-HAMBOR, ESQ.
TAWANDA WALLACE, Paralegal
LYNN MILLER, Paralegal
Environment & Natural Resources Division
General Litigation Section
U.S. Department of Justice
601 Pennsylvania Avenue, N.W., Room 853
Washington, D.C. 20004
(202) 305-0456

Also for the Defendant:

DANIEL W. KILDUFF, ESQ.
U.S. Department of the Interior
Office of the Solicitor
Division of Mineral Resources
1849 C Street, N.W.
Washington, D.C. 20240
(202) 208-4083

Also for the Defendant:

CHARLES P. GAULT, ESQ.
U.S. Department of the Interior
Office of the Field Solicitor
530 South Gay Street, Room 308
Knoxville, Tennessee 37902
(423) 545-4294

CONTENTS

WITNESSES:	DIRECT	CROSS	RE-DIRECT	RE-CROSS	VOIR DIRE
For the Plaintiff:					
James W. Boyd	1074	1192	–	–	–

[1188] A Yes.

Q What factors influenced your decision in this case to conclude that Stearns' value of its property after December 3, 1980, was materially, if not completely, reduced?

MR. KILDUFF: Leading.

THE COURT: Yes. Rephrase the question.

BY MR. CLARK:

Q Did you rely upon any factors to support your conclusion as to the reduction of market value in this case?

A Did I rely on what?

Q What did you rely upon to support your conclusion of a reduction of fair market value?

A What did I rely on?

Q Yes.

A My own opinions.

Q What actions by the United States caused you to reach that conclusion?

A The stopping of the mining that essentially happened in that December 3, 1980, letter. From my view, that took away Stearns' right to mine.

Q What is the effect of the taking away of the right to mine on the marketplace?

A Well, they don't have the mining rights to sell. They have coal, but they have no rights to the coal to sell.

[1189] Q And what would be the impact of that on a prospective purchaser, if any?

A That's why I think it eliminated the value of the property.

Q Are you familiar with the Ramex lease and the fact that it only extends to 8,300 acres?

A Yes, sir.

Q Does your conclusion about the impact of the letter of December 3, 1980, extend to property beyond the Ramex lease?

A Oh, sure.

Q To the entire subject property?

A Yes, sir.

Q Why is that?

A What they said is that, or at least my opinion of what they said is that Stearns did not have control of the right to mine the coal whether that's on Ramex or the others because of valid existing rights. They could not pass that all permits test.

Q Earlier in your testimony, Mr. Boyd, or I guess it was Mr. Gable's testimony, but in your report you identified a certain 2,700 acres of property of mineral rights which are overlaid by private surface.

A Yes.

Q Are you familiar with that?

* * *

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

STEARNS COMPANY, LTD.,	)	
Plaintiff,	)	
v.	)	No. 594-89L
THE UNITED STATES,	)	
Defendant.	)	

Fourth Floor Magistrate's
Courtroom
U.S. District Courthouse for
the Eastern District of
Kentucky
101 Barr Street
Lexington, Kentucky
Wednesday,
October 14, 1998

The parties met, pursuant to the notice of the Judge, at 10:59 a.m.

BEFORE: HON. LOREN A. SMITH Chief Judge

APPEARANCES:

For the Plaintiff:

BRUCE F. CLARK, ESQ.
JUDITH A. VILLINES, ESQ.
PEGGY TIPTON, PARALEGAL
Stites & Harbison
421 West Main Street
P.O. Box 634
Frankfort, Kentucky 40602-0634
(502) 223-3477

MICHELE W. WHITTINGTON, ESQ.
Stites & Harbison
250 West Main Street
2300 Lexington Financial Center
Lexington, Kentucky 40507
(606) 226-2300

EMILY M. IMHOFF, PARALEGAL
Stites & Harbison
400 West Market Street
Suite 1800, Louisville, Kentucky 40202-3352
(501) 587-3400

ROBERT E. GABLE, ESQ.
Chairman of the Board
The Stearns Company
410 West Vine Street
Lexington, Kentucky 40507
(502) 695-1674

For the Defendant:

SILVIA SEPULVEDA-HAMBOR, ESQ.
MARGED G. HARRIS, ESQ.
TAWANDA WALLACE, PARALEGAL
Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663, Washington, D.C. 20044-0663
(202) 305-0456

CHARLES P. GAULT, ESQ.
COURTNEY SHEA, ESQ.
U.S. Department of the Interior
Office of the Field Solicitor
530 S. Gay Street, Room 308
Knoxville, Tennessee 37902
(423) 545-4294

DANIEL W. KILDUFF, ESQ.
U.S. Department of the Interior
Office of the Solicitor
Division of Mineral Resources
1849 C Street, N.W.
Washington, D.C. 20240
(202) 208-4083

CONTENTS

WITNESSES:	DIRECT	CROSS	RE-DIRECT	RE-CROSS	VOIR DIRE
For the Plaintiff:					
Clark Fletcher	2006	2038	–	–	–
Charles L. Mills 2119	2081	2097	–	–	–
For the Defendant:					
James M. Taitt	2132	–	–	–	–

* * *

[2083] Q And what was your involvement with that program?

A I was basically in charge of the acquisition programs as a staff function area, of course. I didn't make the final decisions. But I was more or less team leader of a large group of people who performed evaluation functions.

Q And did you hold that position in 1986?

A Yes, I did.

Q And how many properties was Andalex looking at in 1986?

A Normally we had anywhere from 50 to 60, 65 on – on our – our docket at any one time. Those varied as we – as we discarded some and brought new ones in.

Q Did Andalex prefer to buy or lease, or did it make any difference?

A Well, Andalex, like most every other coal company that I know, would prefer to buy when it can because there is more control. However, leasing is not a bad thing. So it's also equally acceptable at times to lease.

Q Does that involve mining rights and the issue of good mining rights?

A Mining rights are absolutely essential. With no mining rights, you're not – as a coal company, you're typically not interested in property unless you have mining rights.

* * *